Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MISSOURI PACIFIC RAILROAD COMPANY/
UNION PACIFIC RAILROAD COMPANY,
Petitioners,

VS.

CHARLES A. HARPER,
Respondent.

On Petition for Writ of Certiorari to the
Appellate Court of Illinois, Fifth District

PETITION FOR A WRIT OF CERTIORARI

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March, 1997

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QUESTIONS PRESENTED

1. Whether § 60 of the Federal Employers Liability Act, which prohibits any action to prevent railroad employees from furnishing information regarding employee injuries, pre-empts state ethical rules which bar attorneys from engaging in certain *ex parte* communications with the employees of an opposing party, as to which a conflict exists among the state and federal courts of appeal.

2. Whether the petitioners violated § 60 of the FELA by requesting FELA plaintiffs' attorneys to abide by state ethical rules governing *ex parte* communications with the employees of a party.

3. Whether there exists an "atmosphere of intimidation" with respect to reporting employee injuries which would interfere with the ability of respondent's attorneys to obtain information from petitioners' employees about respondent's injury, contrary to § 60 of the FELA.

4. Whether a trial court in Illinois had the authority to issue a permanent injunction under § 60 of the FELA authorizing respondent's attorneys to engage in *ex parte* communications with petitioners' employees on behalf of any FELA claimant they represent.

5. Whether a work rule adopted by all of the major western railroads, including petitioners, which governs who employees can give information to about accidents without the authorization of a manager violates § 60 of the FELA because it fails to include "person in interest," a term used in § 60 with respect to whom accident information may be given to.

(a) Whether petitioners' adoption of the work rule was in wilful violation of a preliminary injunction enjoining petitioners from requiring knowledge or consent of employee witness interviews regarding FELA claims.

6. Whether an order requiring petitioners to send to every one of their employees a letter, by certified mail, telling them to disregard any work rule which prevents them from providing information about employee injuries to attorneys is prejudicial because it makes no exception for disclosure of confidential or privileged reports, or for interviews during work or on railroad property.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. The Petitioners, Missouri Pacific Railroad Company and Union Pacific Railroad Company, are wholly owned by the Union Pacific Corporation.

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OPINIONS BELOW

The order of the Illinois Supreme Court denying discretionary review (Appendix, *infra*, A-) is not reported. The opinion of the Illinois Appellate Court, Fifth District, (Appendix, *infra*, A-2-A-23) is reported at 282 Ill.App.3d 19, 667 N.E.2d 1382.

JURISDICTION

The order of the Illinois Supreme Court denying discretionary review of the judgment of the Illinois Appellate Court, Fifth District, was entered on December 4, 1996. The judgment of the Illinois Appellate Court was entered on August 6, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISION INVOLVED

45 U.S.C. § 60 states:

> Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fining and imprisonment, for each offense; Provided, That nothing herein contained shall be construed to void any contract, rule or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports."

STATEMENT OF THE CASE

I. THE PERMANENT INJUNCTION ORDER

The Evidence

On September 22, 1993, Missouri Pacific Railroad Company and Union Pacific Railroad Company (the Railroads), sent a letter to the attorneys for Charles Harper (Harper), which stated, in pertinent part:

> "[U]nder no circumstances should you or anyone on your behalf communicate directly with any railroad foreman, supervisors, or office personnel about any aspects of the claim of Mr. Harper. Finally, please advise if you wish to interview any railroad employees concerning Mr. Harper's claim. Please do not conduct such interviews without our knowledge and consent.
>
> We believe that attorney ethical rules and laws of most states prohibit contact by you or anyone on your behalf from communicating about your client's claim with any person having managerial responsibility for the railroad, with any person whose statement may constitute an admission of the railroad and any person whose act or omission may be imputed to the railroad for purpose of civil liability. We expect you and others acting on your behalf to honor these principles." (Pl.Ex. 4) ("the letter")

On November 19, 1993, Harper filed a Complaint against the Railroads under the Federal Employers Liability Act (FELA) for damages for repetitive trauma injuries. (C3-4) In addition, Count III of the Complaint asked for a permanent injunction to enjoin the Railroads from using the letter requesting their knowledge and consent to employee-witness interviews. (C6, 9) Harper alleged Section 60 of the FELA authorized his attorneys to conduct *ex parte* interviews of the Railroads' employees despite any state ethical rule to the contrary. (C7, 8)

The following evidence was considered by the trial court in determining whether the permanent injunction should issue:

One of Harper's attorneys, Roger Denton, testified the letter caused his firm not to go out and interview witnesses because they were afraid the Railroads would charge them with an ethical violation. (R324-325)

Gary Barker, a railroad union official, testified that railroad management does not want employees to report injuries, and that some have gone so far as to threaten employees with their jobs if they reported an accident. (R151-152) Barker did not know of any witness in Harper's case who had been intimidated from giving information about his claim, or who refused to talk to Harper's attorneys. (R203-204) The witnesses to Harper's claim of repetitive trauma are all of the people he worked with over the past twenty-five years. (R425)

Seven of Harper's co-workers testified that for at least the last five to eight years, they had never been intimidated or threatened by anyone from the Railroads about reporting or having witnessed an accident. (R448-449, 480-481, 498, 517-518, 527-528, 551, 575-576) Several of the older workers recalled that some twenty years ago, three foremen made statements implying that jobs could be lost if someone came forward as a witness to an accident during that time. (R483-484, 486, 478-479, 531, 532, 540) These foremen were fellow union members, not company officials. (R495, 539) Because of the statements made by these now deceased or retired foremen, some laborers may still be fearful for their jobs if they report being a witness to an accident. (R534, 535, 536, 540-541)

Two current foremen testified it is their policy, and the policy of their supervisor, to report all accidents, and if you are a witness, you have to fill out an accident report. (R480, 488-489, 494, 538-539, 540, 541-542) The policy today is that workers are not discouraged from reporting, or identifying themselves as witnesses to, accidents. (R539-540, 542, 544, 590)

Roger Denton testified that in another case in which he represented Cornell Phillips, two eye-witnesses to the accident who initially agreed to give him a statement became hostile toward him after they said they had talked to a company lawyer. (R331, 332) One of those eye-witnesses, David Standridge, testified Denton

came to the hospital where Standridge's wife had just given birth. (Standridge dep. 9-10, 11) The baby was in intensive care. (Standridge 11) Standridge told Denton he had other things on his mind and was not in the mood to talk about Phillips' case. (Standridge 9-10) Standridge had never discussed talking to Denton with anyone from the Railroads. (Standridge 10, 11, 36)

Cornell Phillips testified that prior to 1987, a foreman threatened him with his job if he got involved as a witness to another guy's accident. (R124, 130-131) Phillips got involved anyway. (R131) According to Phillips, other witnesses to the same injury had the same comments made to them by this foreman. (R133) However, five of Phillips co-workers testified that they had never been threatened or intimidated by anyone from the Railroads about coming forward as a witness to an accident. (Thomas, 4-5, 6, 7; Burks, 5-6,; Parham, 5, 6; Crow, 5-6; Standridge 7-8, 12)

How The Federal Question Was Presented

The federal questions in this case were first raised when Harper filed his Complaint alleging the Railroads violated section 60 of the FELA, and alleging that section 60 pre-empted state ethical rules concerning *ex parte* communications with the employees of a corporate party. The trial court ruled on these federal questions as follows:

On June 30, 1995, the trial court entered a permanent injunction authorizing Schlichter, Bogard & Denton, Harper's attorneys, to conduct *ex parte* interviews of the Railroads' employees regarding FELA claims; and enjoining the Railroads from using letters requiring knowledge and consent to employee interviews, or in any way interfering with *ex parte* communications by Schlichter, Bogard & Denton with their employees. (C1234-1235, 1330) The trial court found Section 60 of the FELA pre-empted any state statute or ethical rule that would prohibit Schlichter, Bogard & Denton from conducting *ex parte* interviews of the Railroads' employees concerning FELA claims. (C1234-1235, 1330)

In its order, the trial court also found the Railroads have created an atmosphere of intimidation such that some employees are fearful of coming forward with information about an FELA claimant's injury. (C1332) The trial court stated representatives of the

railroad, including attorneys, have intimidated employee witnesses from voluntarily providing information to claimants' representatives. (C1332-33) No mention of any intimidation of witnesses to Harper's claim was made in the trial court's order.

In the Illinois Appellate Court, the Railroads raised the federal questions at issue by appealing the trial court's permanent injunction order of June 30, 1995 seeking reversal of that order. The Illinois Appellate Court passed on the federal questions as follows:

The Illinois Appellate Court, Fifth District, affirmed the permanent injunction order of the trial court. With respect to whether section 60 of the FELA gives Harper's attorneys the right to communicate *ex parte* with the Railroads' employees, despite state ethical rules to the contrary, the Court adopted its discussion of this issue contained in its decision at the preliminary injunction stage of this same case, *Harper v. Missouri Pacific R.R. Co.*, 264 Ill.App.3d 238, 636 N.E.2d 1192 (Ill.App. 1994) (hereinafter "*Harper I*") (App., A-24 - A-43). (App., A-13) In *Harper I*, the Court noted section 60 does not attempt to distinguish between certain types of railroad employees. Whereas, state ethical rules do protect certain categories of employees of a party from *ex parte* contacts. The Court found:

> "If Congress intended such, it could and should have set forth the distinction between classes of employees in section 60 or provided for the various States to make exceptions for certain classes of employees * * * Given the purposefully broad language of section 60 and the courts' uniformly liberal construction of that language, we find that the trial court was within its sound discretion in finding that any State statute or rule, including the Rules of Professional Conduct (134 Ill.2d R. 1.1 *et seq.*), that prohibits plaintiffs' attorneys from conducting *ex parte* interviews with the defendants' employees regarding facts incident to FELA claimants' injuries is preempted by Federal law. [Citation omitted] (App., A-39)

Furthermore, the Illinois Appellate Court held the evidence supported the trial court's finding that the actions of the Railroads created an atmosphere which intimidates employees from furnish-

ing information about cases brought under the FELA. (App., A-14) The Court cited to the testimony of several witnesses that in the past, they had been told if they saw someone injured on the job, "they shouldn't see it." (App., A-15) However, the Court failed to observe this incident took place some twenty years ago. (R436) The Court noted the testimony of a couple of witnesses that although they personally have no fear about reporting an accident, or talking to a claimants' attorney about an accident, they heard or know of other employees who are fearful. (App., A-15) In addition, it noted witness Michael Williams refused to talk to Harper's attorneys before the trial for the permanent injunction, but he did talk to the Railroads' attorneys. (App., A-15) The Court omitted the fact that the reason Williams did not want to talk with Harper's attorneys had nothing to do with being afraid of what the Railroads might do if he did. (R450, 470-471) Finally, the Court cited to the testimony of several witnesses that they would be concerned if there was a work rule against talking to an FELA claimants' attorney without first getting authorization from the Railroads. (App., A-15) The Court failed to acknowledge that the Railroads denied there was such a rule.

The Court also affirmed the scope of the injunction which was not limited Harper's case only, but "applies across the board to plaintiff's attorneys and allows them free access to conduct unrestricted, *ex parte* interviews of any and all railroad employees." (App., A-16) It found that limiting the injunction to the instant plaintiff would be an invitation to the Railroads to commit similar violations of section 60 in the future. (App., A-16)

II. THE CONTEMPT ORDER

The Evidence

Prior to the entry of the permanent injunction, the trial court entered a preliminary injunction as to Count III of Harper's Complaint based on § 60 of the FELA. (C88) The preliminary injunction was entered on December 9, 1993, and enjoined the Railroads, in part, from "requiring knowledge and consent of employee witness interviews concerning facts incident to FELA claimants' injuries." (C88, 93)

On August 2, 1994, Harper filed a petition to show cause why the Railroads should not be held in contempt of court for violating the foregoing portion of the preliminary injunction order by revising an employee work rule regarding the giving of statements. (C787, 790) The Railroads' former rule, Rule 807(2), regarding statements read:

> "Except when authorized by proper authority:
>
> (2) Information as to the facts pertaining to the injury or death of an employee must not be given to anyone except a person in interest, such as the injured employee, or an immediate relative of the injured or deceased employee, or to an officer of the law." (C. 789; Pugmire deposition exh. 2)

The Railroads' revised rule, Rule 1.2.6, provides:

> "Except when authorized by the proper manager:
>
> Information about the facts concerning the injury or death of an employee may be given only to the injured or deceased employee, an immediate relative of the injured or deceased employee, an authorized representative of the railroad, or an officer of the law." (C789; Pugmire deposition exh. 3)

In his petition for rule to show cause, Harper alleged that the Railroads' revised rule eliminated the phrase "persons in interest." (C790) In its preliminary injunction order, the trial court found "persons in interest" to whom accident information may be passed under § 60 of the FELA included attorneys representing FELA claimants. (C89) Harper alleged the effect of the Railroads taking out "persons in interest" from the rule was to prohibit employees from relating facts about employee injuries to plaintiffs' attorneys without the Railroads' authorization. (C790)

Robert Pugmire testified for the Railroads at the hearing on Harper's petition to show cause. (R598) Pugmire is Union Pacific Railroad Company's Director of Operating Rules. (Pugmire deposition, p. 4) Pugmire was on the General Code Committee, comprised of representatives from a number of different railroads, which revised the Rule book adopted by all of the major western railroads and short line railroads. (Pugmire dep., pp. 4-5) The revision of the rule book was for the purpose of making the rules

simpler and easier to understand. (Pugmire dep., pp. 5, 9-10) All of the rules were revised, not just Rule 1.2.6 on "Statements." (Pugmire dep., pp. 4-5)

The General Code Committee did not consider Rule 1.2.6 as a change from the prior rule. (Pugmire dep., p. 11) The only change concerning Rule 1.2.6 was to take out the phrase "person in interest" which the committee considered vague and could include a rail buff or newspaper reporter who were the people the committee did not want the employees to think had an implied right to interview them. (Pugmire dep., p. 10) The rule as it concerns injured employees' attorneys did not change. (Pugmire dep., p. 10) Neither the prior rule nor the revised rule specifically included injured employees' attorneys. (Pugmire dep., pp. 10-11) However, both rules include the injured employee himself. (Pugmire dep., pp. 15-16) The intent behind the inclusion of the injured employee in the rules was to let the injured employee designate who could gather information on his behalf, which would include his legal or union representative. (Pugmire dep., p. 14, 15) Pugmire believed the employees understood this intent. (Pugmire dep., pp. 14, 18, 20, 25, 26, 27) Rule 1.2.6 only applies to the employees while they are at work. (Pugmire dep., pp. 12, 31; Crow deposition, p. 11; Burks deposition, p. 10)

The revisions to the prior rules were made during a two and a half year period before April of 1994 when they took effect. (Pugmire, p. 32) Thus, Rule 1.2.6 would have been revised before December of 1993 which was when the preliminary injunction was issued. (Pugmire, p. 32)

Most of the employees who testified by deposition or at trial were not aware of Rule 1.2.6. (R491, 505, 514, 521, 536-537; Crow deposition, pp. 9-10; Burks deposition, p. 9; Thomas deposition, p. 9; Parham deposition, p. 10) The two witness who read Rule 1.2.6 before the trial did not believe it prohibited them from talking to an injured worker's attorney off railroad property. (R465, 466, 508, 509, 514-515)

Most of the employees agreed Rule 1.2.6 did not specifically state they could give statements to attorneys for injured workers, without the authorization of the railroad. (R466-467, 491-492, 506,

521) The prior rule, Rule 807(2), did not specifically state employees could give statements to attorneys either. (R495, 568-569; Pugmire deposition, pp. 10-11) Laymen such as these workers would not know what "person in interest" meant. (R573; Pugmire deposition, p. 10)

If there was a rule prohibiting employees from talking to an injured worker's attorney, some employees would not, or would be reluctant about, talking to an injured worker's attorney, unless it was approved by a supervisor. (R522, 538, 558; Crow deposition, p. 10; Parham deposition, p. 9)

How The Federal Question Was Presented

The federal question of whether the Railroads violated § 60 of the FELA by revising their work rule on "Statements" was first raised in the trial court when Harper filed his Petition for Rule to Show Cause. The trial court found that the revision, e.g., taking out the phrase "person in interest," had the effect of prohibiting employees from communicating information to Harper's and other FELA claimants' attorneys without the Railroads' authorization. (C1239) It found this revision constituted a willful and flagrant violation of the preliminary injunction order which enjoined the Railroads from "requiring knowledge and consent of employee witness interviews concerning facts incident to FELA claimants injuries." (C1239)

The court ordered the Railroads (1) to send a copy of the order and a letter in the identical form of Exhibit 1[1], attached to the order,

---

[1] Exhibit 1 states:

> "Enclosed is a copy of a Order entered on January 5, 1995 by the Honorable Daniel J. Stack of the Circuit Court for the Third Judicial Circuit, Madison County, Illinois. The Missouri Pacific Railroad Company and the Union Pacific Railroad Company have been enjoined by the Court from in any way preventing you from providing information about employee injuries to the injured employee's attorney and have been ordered to rescind or revise Rule 1.2.6 regarding furnishing information. You should disregard any rule promulgated or adopted by the company which prevents you from providing information about employee injuries to their attorneys. Specifically, Rule 1.2.6 regarding statements should be disregarded. (C1242)

to each of its employees by certified mail, return receipt requested, on or before July 15, 1995; (2) to rescind or revise Rule 1.2.6 consistent with the order; and (3) to pay Harper $150 a day for every day since April 10, 1994 through the day the rule is rescinded or revised. (C1240-1241)

In the Illinois Appellate Court, the Railroads raised the federal question involved in the contempt order by appealing that order seeking its reversal. The Illinois Appellate Court passed on the federal question as follows:

> "The trial court in its order dated December 9, 1993 noted that attorneys who represented employees asserting claims under the Act are "persons in interest." The trial court obviously believed that the removal of the words "persons in interest" approximately four months after the December 9, 1993, order was not a mere coincidence and chose to disregard Robert Pugmire's testimony that the change was made in order to make the rule simpler and easier to understand and that the "rules committee" did not consider rule 1.2.6 a change from the prior rule * * * Here, we agree with the trial court's determination that the revision was done in wilful violation of the preliminary injunction." (App., A-19)

On appeal to the Illinois Appellate Court, the Railroads also urged that the requirement that letters be sent to the employees by certified mail was burdensome, unnecessary and prejudicial. Notification of rule changes is made through the general order process. Furthermore, the mandated form letter makes no exception for interviews on railroad property or while the employees are at work, or for disclosure of confidential files.

The Illinois Appellate Court determined it was unnecessary for the letter to make exception for disclosure of confidential reports because "confidentiality in employee files is implicit." (App., A-23) It also noted the letter states Rule 1.2.6 "regarding *statements* should be disregarded, thus limiting the inapplicability of the rule to that section only." (App., A-23) The Court failed to note there was no section of the rule limited to statements. Rather, the title of

Rule 1.2.6 itself was "Statements." The Railroads' concern that the letter invited employees to set up interviews with FELA plaintiffs' attorneys during working hours and on railroad property was not addressed by the Appellate Court.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Illinois Appellate Court that 45 U.S.C. §60 Pre-empts, or Authorizes a Violation of, State Ethical Rules Barring Certain *Ex Parte* Communications Between an Attorney and the Employees of an Opposing Party Conflicts with the Decisions of a Number of United States District Courts and of the Missouri Court of Appeals, and Aggravates the Existing Split of Authority in the District Courts.

There is a conflict among the state and federal district courts as to whether Section 60 of the Federal Employers Liability Act (FELA), 45 U.S.C. §60, authorizes *ex parte* communications by an FELA plaintiff's counsel with the employees of a defendant railroad, even though such *ex parte* communications are in violation of state ethical rules.

Illinois, like most states, has adopted the American Bar Association's (ABA) Model Rule of Professional Conduct 4.2 which provides:

> "During the course of representing a client a lawyer shall not communicate or cause to communicate on the subject of the representation with a party the lawyer knows to be represented by another lawyer in that matter unless the first lawyer has obtained the prior consent of the lawyer representing such other party or as may otherwise be authorized by law." (134 Ill.2d R. 4.2)

When one of the parties is a corporation, this rule prohibits *ex parte* communication with (1) persons having managerial responsibility for the organization; (2) persons whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability; and (3) persons whose statements may constitute an admission on the part of the organization. (Official Comment to ABA Model Rule 4.2)

The Illinois Appellate Court in this case held § 60 of the FELA pre-empted Rule 4.2 and authorized Harper's counsel to conduct *ex parte* interviews of *any* of the railroad's employees regarding FELA claimants' injuries. Section 60 provides:

> " Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to *a person in interest* as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to *a person in interest* . . . shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fining and imprisonment, for each offense; Provided, That nothing herein contained shall be construed to void any contract, rule or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports." (45 USC §60) (Emphasis Added)

Under this statute, a lawyer retained by an injured railroad worker to pursue an FELA claim is a "person in interest" to whom accident information may be furnished. *Queensberry v. Norfolk & Western Ry. Co.*, 157 F.R.D. 21, 24 (E.D.Va. 1993) *citing Sheet Metal Workers Int'l Ass'n v. Burlington Northern R.R. Co.*, 736 F.2d 1250, 1252 (8th Cir. 1984)

The decision of the Illinois Appellate Court that § 60 pre-empts state ethical rules prohibiting *ex parte* communications by an FELA plaintiff's counsel with certain employees of a defendant railroad conflicts with the decisions of the United States District Courts in *Branham v. Norfolk & Western Ry. Co.*, 151 F.R.D. 67, 71 (S.D.W.Va. 1993), *Queensberry*, 157 F.R.D. at 25 (E.D.Va. 1993), *Tucker v. Norfolk & Western Ry. Co.*, 849 F.Supp. 1096, 1100-1101 (E.D.Va. 1994), *Garrett v. National Railroad Passenger Corp.*, Civ.A. No. 89-8326, 1990 WL 122911 (E.D.Pa. Aug. 14, 1990), and *O'Brien v. Union Pacific R.R. Co.*, No. CV93-00490 (Neb. Sep. 20, 1994), and with the decision of the Missouri Court of Appeals in *State ex rel. Atchison, Topeka, & Santa Fe R.R. v. O'Malley*, 888 S.W.2d 760 (Mo.App. 1994). These jurisdictions hold that § 60 does not pre-empt state rules of professional conduct or authorize FELA plaintiffs' counsel to communicate *ex parte* with railroad employees within the purview of state ethical rules.

There is also a conflict among the United States District Courts themselves on the pre-emption issue. In *United Transp. Union v. Metro-North Commuter R.R. Co.*, No. 94 Civ. 2979 (S.D.N.Y. 1995) and *Blasena v. Consolidated Rail Corp.*, 898 F.Supp. 282 (D.N.J. 1995), the District Courts agreed with the Illinois Appellate Court that § 60 pre-empts state ethical rules. The Georgia Court of Appeals in *Norfolk Southern R.R. Co. v. Thompson*, 208 Ga.App. 240, 430 S.E.2d 371 (1993) also espoused the view that *ex parte* interviews in FELA cases do not violate state ethical rules because FELA plaintiffs' counsel are authorized by § 60 to conduct such interviews. *Id.*, 430 S.E.2d at 376

Due to the conflict not only between Illinois and the United States District Courts, but between the United States District Courts themselves, this Court must resolve whether § 60 of the FELA pre-empts state ethical rules regarding an attorney's *ex parte* communications with the employees of the opposing party.

II. It is Important that this Court Resolve the Existing Conflict Between the State and United States District Courts As to the Effect of 45 U.S.C. §60 on State Rules of Professional Conduct.

Resolution of the conflict over whether § 60 of the FELA authorizes *ex parte* communications by an FELA plaintiff's counsel with a defendant railroad's employees in violation of state ethical rules will obviously affect many other persons and companies besides the actual litigants in this case. The resolution of this issue will affect FELA plaintiffs' attorneys, FELA plaintiffs, FELA defendants and their employees, FELA defense counsel, and the states' ability to enforce their rules of professional conduct in FELA cases.

First, in FELA lawsuits filed in Illinois, due to the Illinois Appellate Court's decision in this case, all FELA plaintiffs' counsel are given express permission to interview *ex parte* any employee of a railroad to obtain statements concerning an FELA claim. Plaintiffs' counsel are given this right under the auspices of federal law, despite the fact that Illinois considers the practice unethical.

Second, the law in FELA cases is in a state of confusion due to the conflict between the State and United States District Courts, and

between the United States District Courts themselves, as to the effect of § 60 on state rules of professional conduct. As a result, the application of § 60 to FELA plaintiffs and their investigation of claims, and to FELA defendants and their defense of claims, is dependent upon the jurisdiction the case is filed in. This Court has held that the FELA "is to have uniform application throughout the country * * * " *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 244, 63 S.Ct. 246, 87 L.Ed. 239 (1942) *quoting Panama R.R. Co. v. Johnson*, 264 U.S. 375, 392, 44 S.Ct. 391, 68 L.Ed. 748 (1924) Without a decision by this Court in this case, inconsistent application of § 60 throughout the country would result, contrary to the requirement of uniformity in application of FELA law.

It is illogical and unfair to give FELA plaintiffs' counsel in one jurisdiction the right to conduct *ex parte* interviews with any railroad employees, but to deny that right to FELA plaintiffs' counsel in another jurisdiction. By the same token, to make the right of an FELA defendant to conduct its defense with the protection of state ethical rules regulating *ex parte* communications with its employees dependent on the jurisdiction the case is filed in is irrational and unjust. Indeed, the inconsistent application of § 60 may result in more unfairness to an FELA defendant who has no control over where the case is filed. At least an FELA plaintiff can choose the jurisdiction in which to file his lawsuit, which is any jurisdiction the railroad does business in.

FELA litigants are not the only ones affected by the decision of the Illinois Appellate Court. In addition, the practical effect of a finding of pre-emption is to enjoin enforcement of Illinois Rule of Professional Conduct 4.2 and similar regulations of other states in FELA cases. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it [and members of the public benefitted by the statute] suffers a form of irreparable injury." *Motor Vehicle Board v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351, 98 S.Ct. 359, 54 L.Ed.2d 439 (1977)

Furthermore, absent a clear pronouncement from this Court, the states should not be forced to except plaintiffs' attorneys in FELA

cases from what the states consider unethical conduct. As stated in *O'Malley*, "[i]t would be an illogical rule that made the identical attorney conduct ethical or unethical depending on the underlying law of the client's cause of action." *O'Malley*, 888 S.W.2d at 763

III. The Decision of the Illinois Appellate Court that 45 U.S.C. §60 Pre-empts State Ethical Rules Governing Ex Parte Communications With the Employees of a Represented Party is Erroneous.

In its decision of August 6, 1996, the Illinois Appellate Court, Fifth District, adopted the discussion contained in its previous decision in this same case ("*Harper I*") for its holding that section 60 gives plaintiff's attorneys the right to communicate *ex parte* with defendants' employees. (App., A-13, *citing Harper v. Missouri Pac. R.R. Co.*, 282 Ill.App.3d 19, 636 N.E.2d 1382, 1201-1202 (5th Dist. 1994).) In *Harper I*, the Illinois Appellate Court found § 60 pre-empted any state statute or ethical rule regarding *ex parte* interviews of railroad employees because:

> "section 60 in no way attempts to distinguish between managerial employees and other railroad employees. If Congress intended such, it could and should have set forth the distinction between classes of employees in section 60 or provided for the various States to make exceptions for certain classes of employees." *Harper I*, 636 N.E.2d at 1202

This oversimplified interpretation of § 60 to conclude pre-emption in favor of the plaintiffs' attorneys' bar ignores rules established by this Court for determining pre-emption.

There is a presumption that Congress did not intend the federal statute to displace state law where the federal statute does not explicitly state it pre-empts state law. *Maryland v. Louisiana* 451 U.S. 725, 746, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981) Furthermore, where the field which Congress is said to have pre-empted has traditionally been occupied by the States, a court must assume that the historic police powers of the States were not to be superseded by a federal statute unless that was the clear and manifest purpose of Congress. *Rice v. Santa Fe Elevator* 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947)

This Court has recognized that the field of regulating attorneys' conduct is one traditionally occupied by the States, and is one in which the States have a great interest. The States have a compelling interest in the practice of professions within their boundaries, and as a part of their power to protect the public health, safety, and other valid interests, they have broad power to establish standards for regulating the practice of professions. *Goldfarb v. Virginia State Bar* 421 U.S. 773, 792, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975) The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice and have historically been "officers of the courts." *(Id.)*

Therefore, contrary to the Illinois Appellate Court's decision, in the area of regulating attorneys' conduct, there must be a presumption that Congress did not intend for § 60 to pre-empt that area of State law where § 60 does not explicitly provide for pre-emption.

A state statute or regulation may also be pre-empted where Congress creates a scheme of federal regulation so pervasive as to leave no room for supplementary state regulation. *Fidelity Federal Savings & Loan Assn. v. De la Cuesta* 458 U.S. 141, 153, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982) The intention of Congress to regulate exclusively under the Commerce clause will not be implied unless the federal regulation is plainly inconsistent with state regulation of the same subject. *Gilvary v. Cuyahoga Valley Ry. Co.* 292 U.S. 57, 60, 50 S.Ct. 573, 78 L.Ed. 1123 (1933) A high threshold must be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act. Any conflict must be "irreconcilable * * * The existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption of the state statute." *Rice v. Norman Williams Co.* 458 U.S. 654, 659, 102 S.Ct. 3294, 73 L.Ed.2d 1042 (1982) The decisions of the United States Supreme Court enjoin seeking out conflicts between state and federal regulations where none clearly exist. *English v. General Electric Co.*, 496 U.S. 72, 90, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990)

Congress' intent in enacting section 60 is explained in the legislative history which, in pertinent part, provides:

> "[A] substantial number of the railroads subject to the [Federal] Employers Liability Act have promulgated rules which prohibit employees from giving information concerning an accident to anyone excepting certain specified company officials and claims agents.
>
> The purpose of the amendment under consideration is to prohibit the enforcement of such rules and permit those who have information concerning the facts and circumstances of a personal injury to give statements to the injured employee or his dependents, or to someone authorized to represent him or them." S.Rep. No. 661, 76th Cong., 1st Sess. 5 (1939)

Thus, section 60 "was designed to prohibit the enforcement of *company* rules inhibiting the free flow of information * * * " *Sheet Metal Workers*, 736 F.2d at 1252 (Emphasis added) In including section 60 in the FELA, the authors recognized the danger "that railroad agents would coerce or intimidate employees to prevent them for testifying * * * " *Hendley v. Central Georgia R.R. Co.*, 609 F.2d 1146, 1150 (5th Cir. 1980) Section 60 "prohibits a railroad from disciplining or attempting to discipline an employee from furnishing information to an FELA plaintiff." *Id.* at 1150-1151

Based on the legislative history behind § 60 and the language of the statute itself, the District Court in *Branham* determined that § 60 "has reference to conduct on the part of the railroad-employer which inhibits the furnishing of information by an employee, not to ethical rules regulating the conduct of an ' officer of the legal system.'" *Id.*, 151 F.R.D. at 71 "[T]he statute is a prohibition [against railroad conduct] rather than an authorization [to an FELA plaintiff's lawyer]." *Id.*

Similarly, in *Garrett*, the District Court explained:

> "While [section 60] prevents the railroad from hindering or preventing any employee `from furnishing voluntarily information to a person in interest' regarding the facts of an accident, it does not authorize plaintiff's counsel to commu-

> nicate with an employee *ex parte* in violation of Rule 4.2 once litigation has begun. Section 60 only prohibits the railroad from, through a policy or practice of intimidation or otherwise, barring employees from furnishing information regarding the facts of an accident voluntarily." *Garrett*, 1990 WL 122911 at *2

Likewise, in finding no conflict between § 60 and state ethical rules, the Missouri Court of Appeals in *O'Malley* noted:"

> "Section 60 [and the disciplinary rule] can be read harmoniously. Section 60 refers to conduct on the part of the railroad/employer which inhibits the furnishing of information by an employee of the railroad, not to ethical rules regulating the conduct of an attorney who is an officer of the court. It was designed to combat retaliatory rules and practices that some railroads used to completely prevent their employees from furnishing information to FELA litigants. * * * [The disciplinary rule does not deny] access to these witnesses. A railroad attorney's presence at the time of the employee interview does not prevent a full free flow of information or intimidate the employee, and any affirmative conduct on the part of the railroad to stifle the employee witness is already specifically prohibited by §60. [citations omitted]" *O'Malley*, 888 S.W.2d at 763

Because state ethical rules regulating attorneys' *ex parte* communications with the employees of an opposing party are not "irreconcilably" in conflict with the purpose and intent of § 60, the decision of the Illinois Appellate Court that § 60 pre-empted, and authorized a violation of, RPC 4.2 was erroneous.

Since § 60 does not authorize an FELA plaintiff's attorney to violate state ethical rules, the Railroads' letter does not contravene § 60. Roger Denton, one of Harper's attorneys, testified the letter inhibited him from interviewing railroad employees because of what he perceived as a threat of being brought up on ethical charges if he did so without the knowledge or consent of the Railroads. The Railroads deny that the letter is or was intended to be threatening. Furthermore, the letter mentions possible unethical conduct only

with respect to *ex parte* communications with those employees covered by ABA Model Rule 4.2. Since § 60 does not authorize Harper's attorneys to breach Rule 4.2, the letter's reference to anticipated compliance with that ethical rule does not violate § 60 either.

IV. There is No "Atmosphere of Intimidation" with Respect to Reporting Employee Injuries Which Would Interfere with the Ability of Respondent's Attorneys to Obtain Information from Petitioners' Employees about Respondent's Injury.

The Illinois Appellate Court also affirmed the trial court's finding that the Railroads violated section 60 by creating an atmosphere which intimidates employees from furnishing information about claims brought under the FELA. The Court refers to the testimony of several witnesses that they were told if they see an injury, "they shouldn't see it." Ignored by the Court is the testimony that this statement was made over twenty years ago by *foremen* who are now either deceased or retired. (R436, 478-479) Foremen are not company officials, they are in the same union as the men who work under them. (R495, 539) Therefore, assuming these foremen made such statements, they were acting out of their own self-interest, and not on behalf of the Railroads.

Moreover, it was undisputed that the policy of the current foremen is that employees must report all accidents. (R488-489, 494, 539-540, 541) This is also the policy of the Supervisor over the foremen and Harper's co-workers. (R541-542) That Supervisor has been there for at least five to eight years. (R407, 447-448, 480, 498, 517, 527-528, 551, 575) For at least the last five to eight years, none of Harper's co-workers have ever been intimidated, harassed, or threatened about reporting accidents or about giving information as a witness to an accident. (R448, 449, 480, 481, 482, 498, 500, 517, 518, 528, 529, 551, 552, 575, 576) They did not have any fear of retaliation by the Railroads if they gave information about an accident to an injured employee's attorney. (R. 449, 459-460, 470-472, 482-483, 500-501, 519-520, 529-530, 548-549, 553, 577, 590-591, 594)

The evidence of isolated statements made to several workers twenty years ago by fellow union workers is not sufficient to prove there is currently a "general atmosphere" created by the Railroads such that witnesses to Harper's claim would be fearful of giving information about his injury. The Appellate Court suggests it would have been difficult for Harper to get employees who were intimidated by the Railroads to testify at trial that they were intimidated. (App., A-14) However, assuming *arguendo* such a suggestion has any validity, there were other ways Harper could have proven his case.

For example, at the hearing for the preliminary injunction, Harper's attorney testified about difficulties he allegedly encountered ten years ago in getting statements from eye-witnesses for Cornell Phillips' FELA case against the Railroads. (R321, 322) The preliminary injunction gave Harper's attorneys one and a half years to interview any witness to Harper's claim *ex parte* prior to the trial for the permanent injunction.[2] At the permanent injunction trial, Harper's attorneys did not testify they encountered any witness to Harper's claim who refused or was reluctant to give them a statement concerning his FELA claim. If there was this "atmosphere of intimidation" which interfered with Harper's attorneys' ability to obtain statements from witnesses to Harper's claim, then Harper's attorneys would and should have testified to that effect, as they did with respect to the Cornell Phillips case. Harper should not be permitted to sustain his burden of proof by asking a court to assume the witnesses to his claim were intimidated from testifying they were intimidated.[3]

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[2] The witnesses to Harper's claim of repetitive trauma are all of his co-workers for the past twenty-five years of which there are hundreds. (R334, 425)

[3] Other ways Harper could have proven his allegation that the witnesses to his claim were inhibited by an "atmosphere of intimidation" from giving statements to Harper's attorneys were to call retired or disabled co-workers to testify or to cross-examine the Railroads' witnesses with respect to this allegation.

In contrast, the Railroads called seven of Harper's co-workers who testified they were not intimidated about giving information about another worker's injury to his attorney. The Railroads also presented the testimony of five co-workers of Cornell Phillips who disputed his claim of intimidation. (Thomas dep., pp. 4-5, 6, 7; Burks dep., pp. 5-6, 7-8; Parham dep., pp. 5, 7-8; Crow dep., pp. 5, 6, 7; Standridge dep., pp. 7-8, 12, 13-14, 24-25) Further, the testimony of David Standridge refuted Denton's testimony that Standridge's unwillingness to give him a statement in the Phillips case was due to the actions of the Railroads' attorney. (Standridge dep., pp. 9, 10, 11, 12, 36) In light of the Railroads' *affirmative* evidence repudiating Harper's claim of an "atmosphere of intimidation" inhibiting the investigation of his FELA injury, Harper did not sustain his burden of proof.

V. A Trial Court in Illinois Does Not Have the Authority to Issue Injunctive Relief Under 45 U.S.C. §60 Giving Blanket Authorization to Respondent's Attorneys to Engage in *Ex Parte* Communications with Any and All Railroad Employees.

The trial court did not limit the injunctive relief to Harper's case. It gave broad relief to Schlichter, Bogard and Denton to conduct *ex parte* interviews on behalf of any FELA claimant it now represents or may represent in the future. (C1234-1235, 1330) However, this suit was not brought in the name of Schlichter, Bogard and Denton. Nor were all FELA claimants represented by Schlichter, Bogard and Denton made plaintiffs to this lawsuit.

In *Zepeda v. United States I.N.S* 753 F.2d 719 (9th Cir. 1983), the court, citing numerous other cases, held without a properly certified class, injunctive relief cannot be granted on a class-wide basis, even to enjoin violations of the United States Constitution. In part, the court relied on the established law that the scope of an injunction can only be as broad as is necessary to provide relief to the named plaintiff. *Zepeda*, 753 F.2d at 727-730

Harper cited *ICC v. Keeshin Motor Express* 134 F.2d 228 (7th Cir. 1943) in support of the trial court's authority to enjoin the Railroads' conduct vis a vis all plaintiffs or potential plaintiffs

represented by Schlichter, Bogard and Denton. The federal government, through the Interstate Commerce Commission, instituted the action in the *Keeshin Motor* case. The Interstate Commerce Act expressly vests the ICC with the authority to institute actions for violations of the Act. All of the cases cited by the court in affirming the unrestricted territorial scope of the injunction were likewise actions brought by the federal government pursuant to express statutory authority. *Id.* at 231-232

Section 60, however, does not authorize a private plaintiff to act as a pseudo-attorney general to enjoin violations of the statute. Nor does our legal system grant an individual plaintiff standing to act on behalf of all persons alleged to be similarly situated. If this principle were not true, there would be no need for class actions. *Zepeda*, 753 F.2d at 727-730

Furthermore, numerous courts throughout the country have held § 60 of the FELA does not authorize FELA attorneys to violate state ethical rules on ex parte communications with employees of a railroad defendant. *Branham*, 151 F.R.D. at 71; *Queensberry*, 157 F.R.D. at 25; *Tucker*, 849 F.Supp. at 1100-1101; *Garrett*, 1990 WL 122911; *O'Malley*, 888 S.W.2d at 763; *O'Brien*, slip.op. at 6 The permanent injunction order in this case giving such authorization to Schlichter, Bogard and Denton with respect to lawsuits filed in other states merely invites counter-injunctions enjoining that authorization.[4] A court in one state is not required by either the full faith or credit clause nor principles of comity to give legal effect to an injunction issued in another state. See, *James v. Grand Trunk Western R.R. Co.* 14 Ill.2d 356, 152 N.E.2d 858, 862-863 (1958) (It is proper for an Illinois court to refuse to recognize and give legal effect to an injunction issued by a court of a sister state restraining prosecution of a case in Illinois.)

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[4] Schlichter, Bogard & Denton's main office is in St. Louis, Missouri. Under Missouri law, attorneys representing injured workers in FELA cases are still bound by Rule of Professional Conduct 4.2. *O'Malley*, 888 S.W.2d at 763

VI. The Work Rule Adopted by the Major Western Railroads Governing to Whom Employees Can Give Accident Information to Without the Authorization of a Manager Does Not Violate 45 U.S.C. §60.

Union Pacific Railroad Company was just one railroad among many railroads involved in a joint effort to revise the Rule book adopted by the major railroads. (Pugmire dep. 4-5) All of the rules were revised. (Pugmire, pp. 4-5) The purpose of the revision of the rules was to make them simpler and easier to understand. (Pugmire, pp. 5, 9-10)

One of the revisions made was to the rule on "Statements."

The former rule, Rule 807, read, in part:

Statements

"Except when authorized by proper authority:

(2) Information as to the facts pertaining to the injury or death of an employee must not be given to anyone except a person in interest such as the injured employee, or an immediate relative of the injured or deceased employee, or to an officer of the law." (C789; Pugmire deposition exh. 2)

The revised rule, Rule 1.2.6, effective April 10, 1994, provides, in pertinent part:

1.2.6 Statements

"Except when authorized by the proper manager:

Information about the facts concerning the injury or death of an employee may be given only to the injured employee, an immediate relative of the injured or deceased employee, an authorized representative of the railroad, or an officer of the law." (C. 789; Pugmire deposition exh. 3)

The revised rule eliminated the phrase "persons in interest," a phrase also used in Section 60. On June 30, 1995, the trial court held the Railroads in contempt for deleting "persons in interest" from the revised rule, finding this action was in violation of a preliminary injunction. In its December 9, 1993 preliminary injunction order, the trial court noted "persons in interest" under § 60 include

attorneys representing employees making FELA claims. Pursuant to § 60, the Railroads were enjoined from requiring knowledge or consent of employee witness interviews concerning facts incident to an FELA claim.

The revision made to Rule 1.2.6, which has been adopted by many railroads, was not in violation of § 60 on which the trial court's preliminary injunction was based. In pertinent part, § 60 states that any rule:

> "[t]he purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void * * * "

It was not the intent or purpose of Rule 1.2.6 to prevent employees from furnishing information to the injured employee or his attorney. Indeed, the intent of the rule was just the opposite.

The General Code Committee, comprised of representatives from many railroads, took out the phrase "person in interest" from the rule because they considered it vague and could include a rail buff or newspaper reporter. (Pugmire, p. 10) These were the people the committee did not want the employees to think had an implied right to interview them. (Pugmire, p. 10) Neither the prior rule nor the revised rule expressly included injured employees' attorneys. (Pugmire, pp. 10-11) However, both rules include the injured employee himself. (Pugmire, pp. 15-16) The purpose of including the injured employee in the rule was so that he could designate who could gather information on his behalf, such as his legal or union representative. (Pugmire, p. 14, 15)

Accordingly, by deleting the phrase "person in interest" from the rule, it was not the intent of the railroads to change the prior practice of allowing employees to give statements to attorneys for injured workers. (Pugmire, pp. 10-11, 14, 15)

With respect to the effect of Rule 1.2.6 on the employees themselves, none of the employees who testified were aware that the rule concerning giving statements had changed. (R. 491, 505, 514, 521, 536-537; Crow deposition, pp. 9-10; Burks deposition, p. 9; Thomas deposition, p. 9; Parham deposition, p. 10) The two

witnesses who might have read the new rule before the trial did not believe it prohibited them from talking to an injured worker's attorney during non-working hours. (465, 466, 508, 509, 514-515)

After being prompted by Harper's attorneys, most of the employees agreed the rule did not specifically state they could give statements to attorneys for injured workers, without the authorization of the railroad. (R. 466-467, 491-492, 506, 521) However, the prior rule did not specifically state they could give statements to attorneys for injured workers either. (R. 495, 568-569; Pugmire, pp. 10-11) Laymen such as these workers would not know what "person in interest" meant. (R. 573; Pugmire, p. 10)

No employee has ever been disciplined or investigated for giving truthful information to an attorney for an injured worker. If it was even considered to bring up an employee witness for such an investigation, Pugmire would be called to interpret the rule and the investigation would be canceled. (Pugmire, p. 28) Section 60 "prohibits a railroad from disciplining or attempting to discipline an employee from furnishing information to an FELA plaintiff." *Hendley*, 609 F.2d at 1150-1151

The change made to Rule 1.2.6, namely taking out the phrase "person in interest," simply did not have any effect on the long established and sanctioned practice of employees being allowed to give information to the legal representatives for injured workers. It was only when Harper's attorneys emphasized that the rule did not specifically state attorneys for injured workers were included in the rule that the witnesses agreed the rule could be interpreted that way. However, the witnesses who read the rule themselves prior to trial had a different understanding. Their understanding and the understanding of the employees in general is that they are not prohibited from talking to attorneys for injured workers because that is the way it was under the prior rule, even though the prior rule did not expressly state it, and the way it has always been.

VII. Petitioners' Adoption of the Work Rule Was Not in Wilful Violation of the Preliminary Injunction.

By revising the rule, the Railroads did not act in wilful violation of the preliminary injunction order so as to be subject to contempt[5]. At the show cause hearing, the Railroads' Director of Operating Rules, Robert Pugmire, unequivocally testified that the revision to Rule 1.2.6 was not intended to change the prior rule in effect as it concerned attorneys for injured employees.

Furthermore, Rule 1.2.6 only applies to the employees while at work. (Pugmire, pp. 12, 31) The Illinois Appellate Court held the preliminary injunction could not apply while the employees are at work or on the Railroads' property. *Harper I*, 636 N.E.2d at 1204 Finally, the revision to the rule was done *before* the preliminary injunction was entered. The revisions to the prior rules occurred during a two and a half year period before April of 1994. (Pugmire, p. 32) Rule 1.2.6 was revised sometime during that time. (Pugmire, p. 32) It was revised before December of 1993 when the preliminary injunction was issued. (Pugmire, p. 32) Since the rule was revised before the preliminary injunction order was even in existence, the Railroads could not have acted wilfully to violate that order.

VIII. The Letter Petitioners Were Ordered to Send to Every One of Their Employees, by Certified Mail, Fails to Protect Against Disclosure of Confidential and Privileged Information, and Interviews During Work or on Railroad Property.

Part of the contempt order requires the Railroads to send a copy of the following letter to every one of its thousands of employees, by certified mail:

> "Enclosed is a copy of a Order entered on January 5, 1995 by the Honorable Daniel J. Stack of the Circuit Court for the Third Judicial Circuit, Madison County, Illinois. The Mis-

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[5] Proof of wilful disobedience of a court order is essential to a finding of contempt. *In re Marriage of Betts*, 155 Ill.App.3d 85, 507 N.E.2d 912, 921

souri Pacific Railroad Company and the Union Pacific Railroad Company have been enjoined by the Court from in any way preventing you from providing information about employee injuries to the injured employee's attorney and have been ordered to rescind or revise Rule 1.2.6 regarding furnishing information. You should disregard any rule promulgated or adopted by the company which prevents you from providing information about employee injuries to their attorneys. Specifically, Rule 1.2.6 regarding statements should be disregarded." (R1242)

The Railroads' employees are accustomed to having changes in work rules communicated to them through the general order process. (Pugmire, p.7) Advising them, instead, by certified letter would not only be burdensome, but would likely be ineffective since the employees are not accustomed to that method of notification of rule changes.

Furthermore, the content of the letter is prejudicial to the Railroads. The letter does not make an exception for interviews on railroad property or during the employees' working hours. If these letters go out inviting employees to set up *ex parte* interviews with FELA claimants' attorneys at any time and any place, the Railroads will be unable to safeguard the safety of those attorneys while on railroad property, and the operation of the Railroads' business will be disrupted. *See Harper*, 636 N.E.2d at 1204

Furthermore, the letters require the Railroads to instruct their employees to disregard Rule 1.2.6 in its entirety: The letter instructs: "Rule 1.2.6 regarding statements should be disregarded." Rule 1.2.6 is entitled "Statements."

The entire rule was not the subject of the rule to show cause. Another part of the rule entitled "Statements" provides:

> "Information in the files or in other privileged or confidential reports of the railroad concerning accidents or personal injuries may be given only to an authorized representative of the railroad." (Pugmire deposition ex. 3)

Section 60 of the FELA states that it shall not be construed to "void any . . . rule . . . with respect to any information contained in the files of the carrier, or other privileged or confidential reports." 45 U.S.C. § 60 If the letters required by the contempt order go out, the employees would be invited to purge the Railroads' files and disclose confidential and privileged reports and information to FELA claimants' attorneys, and the Railroads could do nothing about it.

CONCLUSION

For the reasons stated herein, certiorari should be granted.

Respectfully submitted,

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Contempt Order of the Circuit Court, Madison County, Illinois A-49

APPENDIX A

ILLINOIS SUPREME COURT
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December 4, 1996

Ms. Leslie G. Offergeld
Walker & Williams, P.C.
4343 West Main Street
Belleville, IL 62223

No. 81777 Charles A. Harper, respondent, v. Missouri Pacific Railroad Company et al., petitioners. Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on December 26, 1996.

APPENDIX B

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

NO. 5-95-0514

CHARLES A. HARPER,
Plaintiff-Appellee,

v.

MISSOURI PACIFIC RAILROAD COMPANY
and UNION PACIFIC RAILROAD COMPANY,
Defendants-Appellants.

Appeal from the Circuit Court of Madison County

No. 93-L-1209

Honorable Daniel J. Stack, Judge, presiding

[Filed: Aug. 6, 1996]

JUSTICE GOLDENHERSH delivered the opinion of the court:

A preliminary injunction was entered in August 1993, after defendants instituted a policy concerning the investigation of claims of injured employees brought pursuant to the Federal Employers' Liability Act (the Act) (45 U.S.C. §§ 51 through 60 (1993)). In *Harper v. Missouri Pacific R.R. Co.*, 264 Ill. App. 3d 238, 636 N.E.2d 1192 (1994) (hereinafter *Harper I*), we upheld in all respects the entry of the trial court's preliminary injunction enjoining defendants' policy of requiring notice of and prior consent to interviews with railroad employees who had information concerning claims under the Act, except we did not allow for *ex parte* interviews of defendants' employees when on defendants' property during the working hours of such employees. Defendants now appeal from the order entering a permanent injunction and from the trial court's entry of an order of contempt

against defendants for an alleged violation of the preliminary injunction order. Defendants raise the following issues: (1) whether the trial court erred in admitting former testimony, given at the preliminary injunction hearing, as evidence at the trial for the..permanent injunction, (2) whether the Act gives plaintiff's attorneys the right to communicate *ex parte* with defendants' employees, (3) whether plaintiff sustained his burden of proving he would suffer irreparable harm if his attorneys could not interview, ex *parte,* managerial, supervisory, or office employees, (4) whether the trial court's finding that defendants engaged in affirmative conduct which had the effect of inhibiting employees with knowledge of facts incident to plaintiff's claim from furnishing information to his attorneys was against the manifest weight of the evidence, (5) whether the scope of the permanent injunction is overbroad, (6) whether the trial court erred in holding defendants in contempt, (7) whether the trial court's finding that the revision of a work rule violated the preliminary injunction order was against the manifest weight of the evidence, (8) whether the trial court's finding that the rule was revised in wilful violation of the preliminary injunction order was against the manifest weight of the evidence, (9) whether the trial court erred in ordering defendants to pay plaintiff $150 per day from April 10, 1994, through the day the rule was rescinded or revised, and (10) whether the letters required by the contempt order are unnecessary and prejudicial to defendants. We affirm in part, reverse in part, and remand with directions.

Since we have previously set forth the facts pertaining to the entry of the preliminary injunction order (see *Harper I)* we need not repeat those facts here. Instead, we choose to recite only the additional facts necessary for an understanding of the instant matter. Please refer to *Harper I* for the history of the instant case.

[The following material is nonpublishable under Supreme Court Rule 23 and MR No. 10343 (Official Reports Advance Sheet No. 15 (July 20, 1994), eff. July 1, 1994).]

STATEMENT OF FACTS

A. The permanent injunction.

On March 7, 1995, the trial court conducted a hearing on plaintiff's motion for a permanent injunction. Plaintiff moved for the admission of the report of proceedings from the preliminary injunction hearing that was held on December 7 and 8, 1993. The trial court allowed plaintiff to submit said report of proceedings over defendants' objection. The facts adduced from these witnesses' testimony are outlined in *Harper I.*

At the hearing on the permanent injunction, defendants called plaintiff to testify. Plaintiff is a 25-year veteran of Union Pacific Railroad Company (Union Pacific) who suffers from carpal tunnel syndrome. Because plaintiff suffers from a repetitive trauma injury, there are no actual occurrence witnesses. Plaintiff testified that during his career with the railroad he witnessed two employee injuries. When he attempted to come forward with information concerning these accidents, he was immediately harassed by the railroad's claims agent. Plaintiff testified that this intimidated him about supplying information relative to employee injuries. Plaintiff explained that he was instructed by three of his former immediate supervisors that should he see a fellow employee get injured, he "should't see it." Plaintiff specifically recalled Ike Johnson, Ike Phillips, and Hillard Phillips telling him not to report accidents. Consequently, plaintiff believed that if he came forward with information concerning employee injuries, he would be fired. Plaintiff stated that for at least the last five to eight years his supervisor has been Rick Martin. Plaintiff agreed that since Martin has been his supervisor, no one from the railroad has ever tried to intimidate him from filling out an accident report or from talking to an attorney for an injured coworker. Plaintiff also agreed that he filled out accident reports regarding both of the accidents he witnessed; however, with regard to one such victim, David Campbell, plaintiff testified that when a claims agent came to plaintiff's home to discuss

the Campbell incident, plaintiff felt intimidated. Plaintiff testified that as the result of filling out the accident report, he was given "some dirty duties."

The next witness to testify was Michael Williams, a trackman with the railroad since 1970. Williams testified that he has never felt threatened or intimidated about giving statements to an attorney for an injured employee. Williams admitted that he did not want to talk to plaintiff's attorney prior to trial, but he explained that it was out of ignorance of the court system rather than because of intimidation by the railroad. While Williams did not talk to plaintiff's attorney even after plaintiff's attorney so requested, Williams did talk to attorneys for the railroad.

Vernice Bundy, section foreman for the railroad and an employee of the railroad since 1970, stated that Rick Martin, his supervisor for the past six or seven years, has always told him to report accidents. Bundy witnessed one accident last year and filled out an accident report. Bundy has never talked to an injured worker's attorney about a case but stated that if he was ever approached, he would not hesitate to talk to the attorney. On cross-examination, Bundy, who previously worked for Ike Johnson and Hillard Phillips, admitted that he was told by both that if he saw an employee accident, he should say that he did not see it. Bundy does not believe that this policy is in effect anymore because these men are either retired or dead and the policy was never in writing.

Robert Tritch, employed by the railroad since September 1990, was called by defendants. Rick Martin is also his supervisor. Tritch stated that he has never been threatened personally by the railroad about reporting accidents, but he also stated that he feels there is an atmosphere of intimidation surrounding injuries, especially for employees of the railroad who have been there longer than he has. Tritch stated that he knows people who have been intimidated and discouraged from talking to an attorney for an injured worker. Tritch feels the railroad is getting more and

more safety concious all the time and that the railroad never takes any responsibility for accidents. Tritch explained, "If you're hurt, it's not their fault, it's your fault because they've got a rule to cover everything that [sic] you know, and if they don't have a rule for that situation they'll come up with a new rule."

Ali Jones was next called by the defense. Jones is a 24-year veteran of the railroad and is currently a trackman. Rick Martin is also Jones' supervisor and has been for the past seven or eight years. Since Martin has been a supervisor, no railroad employees have ever intimidated him about reporting accidents. Jones stated that after reading the new rule of the railroad regarding the four categories of persons a worker can talk to after witnessing an accident, he would not talk to plaintiff's counsel unless he first got an okay from his supervisor.

Wallace Deal, track foreman and a 25-year veteran of the railroad, worked directly with plaintiff for three or four years and is also supervised by Rick Martin. In the past five years, Deal has never been intimidated or threatened with discipline if he reported an accident. Deal did state that he has heard of other employees who were intimidated or harassed by the railroad for reporting injuries. Deal agreed that in the past he was told that if he ever saw an accident, he should not see it, which he interpreted as a threat by the railroad to take an employee's job for reporting an accident. Deal denied any fear today, however, and stated he would report an accident. Deal further testified that even today, particularly among laborers, there is an atmosphere of fear which exists for reporting injuries. Laborers fear for their jobs and might be reluctant to report injuries. Deal also believed that employees would probably volunteer less information on the subject if one of the railroad's representatives or attorneys were present during a discussion. Deal agreed that the new rule regarding who a worker can talk to after witnessing an accident probably means that employees should not be giving statements to the attorney for the injured party. Deal has witnessed several

injuries and has routinely talked only with claims agents about the injuries. There has never been a lawyer who represented the injured worker present at such discussions.

O.J. Rivers, a trackman for the railroad and another 25-year veteran, was called by the defense. Rivers worked with plaintiff in the past and is now supervised by Rick Martin. Rivers testified he has never been intimidated or discouraged from reporting an accident by any railroad employee. Rivers has witnessed several on-the-job injuries. Claims agents for the railroad routinely interview witnesses with no one else present.

Robert Firstlist, a 25-year veteran of the railroad, was the final witness called by the defense. Firstlist worked with plaintiff in the past. His present supervisor is also Rick Martin. In the past five years, Firstlist has not been intimidated by the -railroad with regard to reporting accidents. According to Firstlist, Martin insists that accidents be reported. Firstlist witnessed an accident and gave a deposition in that case. Firstlist did not remember anyone from the railroad being present at the deposition. On cross-examination, Firstlist admitted that in the past he was told that he "shouldn't be a witness to an injury even if you are a witness." He was told this on more than one occasion by more than one supervisor. Firstlist said that most of the supervisors who made such statements have either retired or died, but that such statements have never been retracted. Firstlist believes things have "changed quite a bit," but he also stated that it was a possibility that the railroad may still not want people to be a witness. On one occasion Firstlist was approached at work by the attorney of an injured employee but refused to talk to the attorney at work. The attorney for the injured party wanted to then meet with Firstlist after work, but Firstlist did not talk with him because he does not "like to be involved in things like that." However, Firstlist stated that it was his own decision not to talk to the attorney, not a decision forced upon him by the railroad. Firstlist does not believe in getting involved unless he is an

eyewitness. Firstlist made a statement in plaintiff's case because he was "under orders" to do so by the railroad. Firstlist explained that during working hours if someone from the railroad asks him to give a statement or to come to court, it is his duty to do so.

At the trial on the permanent injunction, defendants also introduced into evidence the depositions of Floyd Thomas, Elmer Parham, Tony Burks, Joe Crow, and Davis Standridge. These five men worked with Cornell Phillips on the same tie gang since 1982. Phillips testified at the hearing on the permanent injunction, and his testimony was damaging to defendants. For example, according to Phillips the atmosphere on the railroad, in terms of employees feeling free to provide information about injured employees and their cases, was frightening. All five of the witnesses provided by defendants testified via deposition that they have never been threatened or intimidated by the railroads from giving information about a coworker's injury or from talking to an injured worker's attorney.

On June 30, 1995, the trial court entered a permanent injunction, ordering as follows:

"1. Defendants' practice, policy, and use of letters instructing plaintiff's counsel not to conduct interviews of [their employees[,] without [their] knowledge or consent[,] who have knowledge of facts incident to an FELA [Federal Employers' Liability Act] claimant's injury, is void pursuant to 45 USC Sec. 60.

2. Schlichter, Board & Denton and their agents may conduct ex parte interviews of defendants' employees regarding facts incident to FELA claimants' injuries, except when on defendant[s'] property or during the working hours of said employees.

3. Any state statute or rule that would prohibit plaintiff's counsel from conducting ex parte interviews with defendants' employees regarding facts incident to FELA claimants' injuries is preempted by federal law. 45 USC 60.

4. Defendants and their representatives are hereby enjoined and restrained from carrying out their practice, policy and use of letters requiring knowledge and consent of employee witness interviews concerning facts incident to FELA Claimants' injuries, or in any way interfering with ex parte communication by plaintiff's attorneys with their employees regarding such claims, except when on defendant[s'] property or during the working hours of said employees."

Defendants filed a posttrial motion on July 25, 1995, asking the court to vacate its permanent injunction order or, in the alternative, asking for a retrial or for a modification of the order.

On August 16, 1995, the trial court entered an order denying defendants' posttrial motion. In its order, the court clarified the permanent injunction order by substituting the words "Schlichter, Bogard and Denton and their representatives" for the term "plaintiff's counsel" found throughout the order. The trial court found no just reason for delaying either enforcement or appeal of the permanent injunction order, pursuant to Supreme Court Rule 304(a) (155 Ill. 2d R. 304(a)).

B. The contempt order.

On August 2, 1994, plaintiff filed a petition to show cause why defendants should not be held in contempt for violating the preliminary injunction order by revising an employee work rule regarding the giving of statements. Plaintiff's petition for rule to show cause alleged that defendants' revised rule eliminated the phrase "persons in interest" and that the effect of this revision was to prohibit employees from communicating facts relating to other employees' injuries to claimants' attorneys without defendants' authorization.

On November 29, 1994, the trial court issued a citation to show cause, and on March 7, 1995, the trial court heard evidence on plaintiff's petition to show cause. Plaintiff offered into evidence plaintiff's exhibit No. 1, which included a copy of the

revised rule 1.2.6. The new rules took effect in April 1994. In his deposition, Robert Pugmire, Union Pacific's director of operating rules, discussed changes in rule 1.2.6. According to Pugmire, the rule was changed only to make the rule simpler and easier for defendants' employees to understand. Pugmire stated that the rules committee did not consider rule 1.2.6 as a change from the prior rule. Pugmire explained that the revisions in the rules occurred during the 2-1/2-year period preceding April 1994. Pugmire stated that the category encompassed by "officer of the law" was meant to indicate a police officer and that the category "authorized representative of the railroad" consisted of the railroad's line management personnel.

While some employees who testified via deposition or at the trial on March 7, 1995, were not aware of rule 1.2.6, most of defendants' employees agreed that rule 1.2.6 did not specifically state they could give statements to an attorney for an injured worker without authorization of the railroad. As previously discussed, while at least one of defendants' employees testified that he would not be intimidated because of the new rule, others testified they would be nervous about talking to an injured worker's attorney if such a rule was in effect.

On June 30, 1995, the trial court found defendants' implementation of the revision found in rule 1.2.6 a flagrant violation of the preliminary injunction order and ordered defendants to remedy their contumacious conduct by sending out a letter to their employees by July 15, 1995, to rescind or to revise the rule consistent with the trial court's order, and to pay plaintiff the sum of $150 per day for each day from April 10, 1994, to the day the rule was rescinded or revised.

The trial court approved an appeal bond to stay the monetary provisions of the contempt order but denied defendants' motion to stay the nonmonetary provisions of the order. We also denied the motion to stay the nonmonetary provisions of the contempt order. Our supreme court, however, granted defendants' motion

for a stay on the nonmonetary provisions of the order pending appeal.

[The preceding material is nonpublishable under Supreme Court Rule 23].

ISSUES

The first issue we are asked to consider is whether the trial court erred in admitting former testimony, given at the preliminary injunction hearing, as evidence at the trial for a permanent injunction. Defendants assert that the testimony of a witness at a former trial is not admissible in a subsequent proceeding of the same action where there is no showing (1) that the witness is unavailable in a legal sense, and (2) why the witness's evidence deposition could not have been taken if the proponent of the testimony exercised due diligence. Defendants argue severe prejudice by the admission of the former testimony because, defendants claim, such testimony was given before they had an opportunity to conduct discovery and to prepare for a meaningful cross-examination. Plaintiff responds that in the instant case evidence from a prior hearing of the same proceeding was simply incorporated by the trial court acting as a factfinder. Plaintiff insists that this requires no citation because what was done here is no different from what occurs daily in bench-tried cases wherein judges take testimony in intervals separated by time.

Plaintiff is correct that the cases cited by defendants are distinguishable from the case at bar because none deal with the incorporation of evidence from a preliminary injunction into a hearing on a permanent injunction. Plaintiff, on the other hand, does provide us with cases in which the evidence from a preliminary injunction hearing was incorporated into evidence at the hearing for a permanent injunction. See *Hess v. Clarcor, Inc.*, 237 Ill. App. 3d 434, 603 N.E.2d 1262 (1992). However, in *Hess*, the parties stipulated to the incorporation of such evidence. *Hess*, 237 Ill. App. 3d at 446, 603 N.E.2d at 1271. *Peoples*

Energy Corp. v. Illinois Commerce Comm'n, 142 Ill. App. 3d 917, 492 N.E.2d 551 (1986), also allowed for the incorporation of testimony and exhibits from the preliminary injunction hearing into the hearing for a permanent injunction. In that case, the City of Chicago was permitted to intervene in the action as a defendant-counterplaintiff after the conclusion of the preliminary hearing. The city argued on appeal that the testimony and exhibits from the preliminary injunction hearing should not have been admitted at the hearing for the permanent injunction. However, since none of the original parties objected and because the city's intervention was subject to the express condition that it be bound by all prior orders or judgments and all evidence previously received, our colleagues on the First District Appellate Court rejected the city's argument. *Peoples Energy Corp.*, 142 Ill. App. 3d at 935-36, 492 N.E.2d at 565. The court also noted that its decision was based upon the facts that the city was given the opportunity to cross-examine the plaintiff's witnesses and that the city made no specific claims of actual prejudice. *Peoples Energy Corp.*, 142 Ill. App. 3d at 936, 492 N.E.2d at 565.

Here, defendants did specifically object to the incorporation of evidence from the preliminary injunction hearing into the permanent injunction hearing. However, we find that because the trial judge was the same in both hearings, no error was committed in allowing evidence from the preliminary injunction hearing to be incorporated into the hearing on the permanent injunction. While defendants claim prejudice due to the fact that such cross-examination occurred prior to conducting discovery, the record and briefs contain no explanation as to how defendants were actually prejudiced. Defendants were allowed to cross-examine plaintiff's witnesses at the preliminary injunction. Moreover, defendants were certainly within their right to recall any witnesses from the preliminary injunction hearing, but they chose not to do so. Defendants would obviously like this case to drag on interminably, but the trial court rightly chose not to hear repetitive evidence.

The second issue raised by defendants is whether the Act gives plaintiff's attorneys the right to communicate *ex parte* with defendants' employees. See 45 U.S.C. § 60 (1993). Defendants argue that we did not sufficiently address this issue in *Harper I* but only considered it at a preliminary stage. We cannot agree. See *Harper I* for a complete discussion of this issue. *Harper I*, 264 Ill. App. 3d at 251, 636 N.E.2d at 1201-02.

We note that the standards of review in cases involving preliminary injunction and permanent injunction are indeed different, as defendants contend, and thus, *Harper I* cannot be said to be the law of the case in the instant matter. In ruling on a preliminary injunction, we must determine whether the trial court abused its discretion in finding that the petitioner demonstrated a *prima facie* case that there is a fair question as to the existence of the rights claimed; that the circumstances lead to a reasonable belief that the petitioner will probably be entitled to the relief sought if evidence sustains the allegations in the petition; and that the status quo should be maintained until the case can be decided on the merits. *Dixon Ass'n For Retarded Citizens v. Thompson* 91 Ill. 2d 518, 524-25, 440 N.E.2d 117, 120 (1982). In order for the issuance of a permanent injunction to be upheld on appeal, the trial court's determination is reviewed by a stricter standard. The question is whether a trial court's decision is contrary to the manifest weight of the evidence. A trial court's judgment is against the manifest weight of the evidence only if the opposite result is clearly evident. *Gerber v. Hamilton*, 276 Ill. App. 3d 1091, 659 N.E.2d 443 (1995); see also *Hamer Holding Group, Inc. v. Elmore*, 244 Ill. App. 3d 1069, 1075-77, 613 N.E.2d 1190, 1195-96 (1993). Here, we find defendants' tactic of ignoring our decision in *Harper I* disingenuous, as there is nothing in the record from the hearing on the permanent injunction which indicates we were mistaken in *Harper I*. The witnesses who testified for defendants simply did not provide strong enough testimony to overcome the evidence

produced by plaintiff that among railroad employees an atmosphere of intimidation prevailed.

The third issue raised by defendants is whether plaintiff sustained his burden of proving he would suffer irreparable harm if his attorneys could not interview, ex *parte,* managerial, supervisory, or office employees. Again, we previously addressed this issue sufficiently in Harper I and need not address it herein. See *Harper I,* 264 Ill. App. 3d at 251-52, 636 N.E.2d at 1202-03. After reviewing the evidence presented by defendants at the hearing on the permanent injunction, we find it insufficient to change our previous determination of this issue in *Harper I.*

The fourth issue raised by defendants is whether there was sufficient evidence to establish that defendants engaged in any affirmative conduct which had the effect of inhibiting employees with knowledge of facts incident to plaintiff's claim from furnishing information to plaintiff's attorneys. Likewise, we believe we sufficiently addressed this issue in Harper I when we discussed the fact that plaintiff's attorney, Roger Denton, testified that his law firm stopped their usual and customary practice of interviewing all railroad employees regarding claims under the Act because of the letters it received from defendants threatening ethical charges. *Harper I,* 264 Ill. App. 3d at 251, 636 N.E.2d at 1202. Moreover, in *Harper I* we found that plaintiff had, in fact, already established, by a preponderance of the evidence, that the general atmosphere of the railroad intimidates railroad employees from furnishing evidence in cases brought under the Act (*Harper I,* 264 Ill. App. 3d at 252-53, 636 N.E.2d at 1203), and that by virtue of defendants' intimidating actions, it would be difficult for plaintiff to find employees ready to testify on plaintiff's behalf, thus establishing the need for an injunction. *Harper I,* 264 Ill. App. 3d at 253, 636 N.E.2d at 1203.

None of the evidence presented by defendants on the hearing for the permanent injunction changes our decision from *Harper I.* In fact, a complete review of the transcript from the hearing on

the permanent injunction supports our determination. First, many of defendants' own witnesses corroborated plaintiff's testimony that in the past they had been told that if they saw a colleague injured on the job, "they shouldn't see it." Wallace Deal testified that he heard of other employees who had been intimidated or harassed by the railroad for reporting injuries. Deal stated that even today there is an atmosphere of fear which exists for reporting injuries, especially among laborers. Second, while all of defendants' witnesses at the permanent injunction hearing agreed that their present supervisor had not espoused a belief in not reporting accidents, the overall tone of the testimony leads us to believe that a hostile environment remains. For example, defense witness Williams refused to talk to plaintiff's attorneys prior to the instant hearing but did talk to defense attorneys. Robert Tritch, also defendants' witness, testified that while he has never been personally intimidated about reporting an accident, he believes an atmosphere of intimidation *still* exists and personally knows of some railroad employees who have been intimidated or discouraged from talking to attorneys for an injured worker. Third, the new rule issued by the railroad on April 10, 1994, was found worrisome by some of defendants employees. For example, Ali Jones testified that with such a rule in effect he would not talk to an injured worker's attorney without first getting an okay from a supervisor. Joe Crow and Elmer Parham, who testified via deposition,. acknowledged that the revised rule regarding employee statements concerns them. The evidence presented by defendants at hearing on the permanent injunction does not change our previous determination in *Harper I* with regard to this issue.

The fifth issue raised by defendants is whether the scope of the permanent injunction is overbroad. Defendants insist that if we affirm the permanent injunction, we must limit such relief to plaintiff's case. We disagree.

Again, we believe we sufficiently addressed this issue in *Harper I.* In that case the only thing we found to be overly broad

was the fact that the preliminary injunction allowed for *ex parte* communications with defendants' employees at any time or any place. We found the injunction needed to be limited in that such interviews should not take place on defendants' property or during the working hours of said employees. *Harper I,* 264 Ill. App. 3d at 253-54, 636 N.E.2d at 1204. However, to the extent that the preliminary injunction applies across the board to plaintiff's attorneys and allows them free access to conduct unrestricted, *ex parte* interviews of any and all railroad employees, we found no error but in fact agreed with the trial court's ruling. *Harper I,* 264 Ill. App. 3d at 253, 636 N.E.2d at 1203.

While it is well settled that courts may not issue a blanket order enjoining any violation of a statute upon a showing that an act has been violated in some respects, courts do possess the authority to restrain violations similar to those already committed. *Interstate Commerce Comm'n v. Keeshin Motor Express Co.,* 134 F.2d 228, 231 (7th Cir. 1943). Here, the trial court was merely restraining defendants from committing additional violations of the Act. Limiting an injunctive order to the instant plaintiff would be an invitation to defendants to commit similar violations in the future. Defendants need to understand that we find these actions reprehensible and an affront to the orderly administration of justice in cases brought under the Act. We strongly believe that any court in the country would be incensed by defendants' flagrant violations of the Act. The scope of the injunction is not overly broad.

The sixth issue we are asked to consider is whether the trial court erred in holding defendants in contempt. Defendants contend that we must vacate the contempt order because when the trial court found defendants in contempt for violating the preliminary injunction order on June 30, 1995, the preliminary injunction order was no longer in existence, as it was superseded by the permanent injunction order. Plaintiff responds, and we agree, that this argument is ludicrous, as the court's contempt

order was based on the hearing held on March 7, 1995, at which time the preliminary injunction was in effect.

The record indicates that on December 9, 1993, the trial court entered a preliminary injunction order. The trial court enjoined defendants from interfering with *ex parte* communication by plaintiff's attorneys with railroad employees regarding claims brought under the Act. Later, the trial court found that defendants deliberately chose to continue the enjoined policy, and on March 26, 1994, as a result of this behavior the trial court held defendants in contempt, finding defendants' contempt to be a serious rejection of the trial court's authority and a continuation of defendants' intimidation of railroad employees. The trial court then found that defendants' revision of their rule regarding employee statements which was effective on April 10, 1994, and which eliminated the clause "persons in interest," constituted a "wilful and flagrant violation of [the trial court's] preliminary injunction order." Therefore, the preliminary injunction was in effect at the time defendants behaved contumaciously. Accordingly, we find that the trial court's contempt order of June 30, 1995, was valid even though the permanent injunction issued on that date.

The seventh issue we are asked to consider is whether the trial court's finding that the revision to the work rule violated the preliminary injunction order was against the manifest weight of the evidence. The eighth issue raised by defendants is whether the trial court's finding that the rule was revised in wilful violation of the preliminary injunction order was against the manifest weight of the evidence. Because these issues are so similar, we choose to consider them together. Defendants contend that plaintiff failed to sustain his burden of proving that the revision of the work rule was made in violation of the preliminary injunction order. Defendants also argue that the evidence showed that the rule was revised before the injunction was issued and the committee that revised the rule was unaware of the

section of the Act at issue. Plaintiff responds that he met his burden, as it is inconceivable that the revision was done for any other purpose than to attempt to prevent defendants' employees from providing information to injured parties' attorneys. We agree with plaintiff.

Defendants' former rule 807(2) states as follows:

> Except when authorized by proper authority:
>
> (2) Information as to the facts pertaining to the injury or death of an employee must not be given to anyone except a person in interest, such as the injured employee, or an immediate relative of the injured or deceased employee, or to an officer of the law."

Defendants' revised rule 1.2.6, effective April 10, 1994, provides:

> "Except when authorized by the proper manager:
>
> Information about the facts concerning the injury or death of an employee may be given only to the injured or deceased employee, an immediate relative of the injured or deceased employee, an authorized representative of the railroad, or an officer of the law."

The burden of proof of showing contempt is on the party bringing the request to show cause, and it must be shown by a preponderance of the evidence. *In re Marriage of LaTour,* 241 Ill. App. 3d 500, 608 N.E.2d 1339 (1993). Noncompliance with an order is a *prima facie* showing of contempt. *In re Marriage of Logston,* 103 Ill. 2d 266, 285, 469 N.E.2d 167, 175 (1984). It is the trial court's function to weigh evidence and to make findings of fact. Unless we can say that the trial court's holding is manifestly erroneous, we will not disturb a trial court's ruling. *Southern Illinois Medical Business Associates v. Camillo,* 208 Ill. App. 3d 354, 369, 567 N.E.2d 74 (1991). "In determining

whether there has been a violation of a court order, the order must be construed with reference to the context in which it was issued and the purpose for which it was requested." *Doe v. Lutz,* 2S3 Ill. App. 3d 59, 64, 625 N.E.2d 325, 329 (1993).

The trial court's preliminary injunction order was clear. Its purpose was to prohibit defendants from "carrying out their practice, policy, and use of letters requiring knowledge and consent of employee witness interviews concerning facts incident to FELA claimants' injuries, or in any way interfering with their employees regarding such claims." In revising the rule regarding employee statements, defendants eliminated the clause "persons in interest." The trial court in its order dated December 9, 1993, noted that attorneys who represented employees asserting claims under the Act are "persons in interest." The trial court obviously believed that the removal of the words "persons in interest" approximately four months after the December 9, 1993, order was not a mere coincidence and chose to disregard Robert Pugmire's testimony that the change was made in order to make the rule simpler and easier to understand and that the "rules committee" did not consider rule 1.2.6 a change from the prior rule. "Where an evaluation of credibility of the weight of the evidence was made by the circuit court, a court of review cannot substitute its judgment for that of the trier of fact unless the evidence is so unreasonable, improbable, or unsatisfactory as clearly to require a different conclusion." *People v. City of East St. Louis,* 206 Ill. App. 3d 626, 639, 564 N.E.2d 1372, 1381 (1990). Here, we agree with the trial court's determination that the revision was done in wilful violation of the preliminary injunction.

The ninth issue we are asked to address is whether the trial court erred in ordering defendants to pay $150 per day from April 10, 1994, through the day the rule was revised or rescinded. Defendants argue that the award cannot be characterized as an award of attorney fees and costs, but rather the $150 per day was

intended to be a penalty in the form of damages, payable to plaintiff, which is improper in contempt proceedings. Further, defendants contend that the issue of whether the amount imposed by the trial court was inappropriate for a fine payable to the public was not an issue raised by the contempt order and, thus, we cannot consider that issue. Plaintiff responds that the trial court was within its discretion to order payment of $150 per day and that such payment should be considered attorney fees and costs and whatever amount which can be considered unreasonable as attorney fees is still payable to plaintiff because plaintiff has been irreparably damaged to the extent that employee witnesses to plaintiff's injury have been intimidated by defendants' flagrant contempt of court. Assuming, *arguendo,* that the $150 per day is found to be a fine, plaintiff responds that the fine imposed should be paid to the public as opposed to plaintiff.

In a civil contempt proceeding, which means that the sanction imposed is strictly coercive *(People ex rel. Chicago Bar Ass'n v. Barasch,* 21 Ill. 2d 407, 410, 173 N.E.2d 417, 418 (1961)), a court may imprison or fine for contempt of its orders but is without authority to recompense an aggrieved party for his damages. *In re Marriage of Wilde,* 141 Ill. App. 3d 464, 473, 490 N.E.2d 95, 101 (1986). It is well settled that in Illinois civil contempt is not a private remedy but is punishment for an affront to the authority of the court, and hence, any fine imposed is payable to the public treasury and not to the plaintiff. *Frank B. Hall & Co. v. Payseur,* 99 Ill. App. 3d 857, 863, 425 N.E.2d 1002, 1006 (1981) (citing *Rothschild & Co. v. Steger & Sons Piano Manufacturing Co.,* 256 Ill. 196, 99 N.E. 920 (1912)). It is appropriate in both civil and criminal contempt cases to require the contumacious party to bear the reasonable costs and attorney fees of a contempt proceeding, especially where, such as here, a private litigant brings before the court the fact of an indirect contempt. *Wilde,* 141 Ill. App. 3d at 473, 490 N.E.2d at 101; see also *Payseur,* 99 Ill. App. 3d at 862, 425 N.E.2d at 1006.

In the instant case, the trial court ordered defendants to pay plaintiff $150 a day for every day from April 10, 1994, through the day the rule was revised or rescinded. We agree with defendants that the result of such a ruling was to levy a fine payable to plaintiff, which is inappropriate in Illinois in cases of indirect civil contempt. The trial court did not schedule a hearing to determine the reasonable costs and attorney fees borne by plaintiff in conjunction with the contempt proceeding. Therefore, we believe it appropriate to reverse that portion of the trial court's contempt order which requires defendants to pay the $150 per day to plaintiff. On remand, we order a hearing to determine plaintiff's reasonable costs and attorney fees associated with the contempt proceeding. That amount should be paid directly to plaintiff. The $150 per day ordered by the trial court should go directly to the public coffers via the clerk of the circuit court.

The final issue we are asked to consider is whether the court-ordered letters are unnecessary and prejudicial to defendants. Defendants contend that the letter required to be sent to each of defendants' employees is unnecessary if rule 1.2.6 is revised to conform to the prior rule, since any changes in the rules will be communicated to the employees by defendants, as is defendants' usual procedure. Additionally, defendants contend the content of the letters is prejudicial to defendants because the content does not provide an exception for interviews on railroad property or during employees' working hours. Defendants also complain that the letters require them to instruct their employees to disregard rule 1.2.6 in its entirety, which they argue is inappropriate since the entire rule was not the subject of the rule to show cause. Specifically, another portion of rule 1.2.6 provides:

> "Information in the file or in other privileged or confidential reports of the railroad concerning accidents or personal injuries may be given only to an authorized representative of the railroad."

Defendants maintain that if the letters are sent, their employees would be invited to purge defendants' files and disclose confidential reports and information to claimants' attorneys. Plaintiff responds that the letters are appropriate and within the trial court's discretion to order in light of defendants' repeated violations of court orders.

The following letter was ordered sent to all defendants' employees:

> Enclosed is a copy of an Order entered on January 5, 1995[,] by the Honorable Daniel J. Stack of the Circuit Court for the Third Judicial Circuit, Madison County, Illinois. The Missouri Pacific Railroad Company and the Union Pacific Railroad Company have been enjoined by the Court from in any way preventing you from providing information about employee injuries to the injured employee's attorney and have been ordered to rescind or revise Rule 1.2.6 regarding furnishing information. You should disregard any rule promulgated or adopted by the company which prevents you from providing information about employee injuries to their attorneys. Specifically, Rule 1.2.6 regarding statements should be disregarded."

Defendants cite no case law to support their proposition that the letters ordered by the trial court are unnecessary or unduly prejudicial. Upon review of said letter, we cannot say that the trial court abused its discretion in ordering that copies be sent to all of defendants' employees. It is obvious from the trial court's June 30, 1995, order finding defendants in contempt that the trial court was outraged by defendants' actions in revising the rule regarding employee statements. We are unconvinced by defendants' argument that sending such letters is the equivalent of inviting defendants' employees to purge files and disclose confidential information. As plaintiff points out, the letters clearly state that rule 1.2.6 regarding *statements* should be disregarded,

thus limiting the inapplicability of the rule to that section only. Additionally, we note that confidentiality in employee files is implicit, and ordering further language to be added to the letter to state such a fact is in our estimation unnecessary. Therefore, we find no error in the trial court's decision to order said letters to be sent.

For the foregoing reasons, the judgment of the circuit court of Madison County is affirmed in part and reversed in part, and the cause is remanded with directions. We order that the mandate issue instanter. *We order that defendants take the required actions immediately.* We see no valid reason for any further delay of enforcement of this injunction.

Affirmed in part and reversed in part; cause remanded with directions.

HOPKINS, P.J., and KUEHN, J., concur.

APPENDIX C

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

NO. 5-93-0803

CHARLES A. HARPER,
Plaintiff-Appellee,

v.

MISSOURI PACIFIC RAILROAD COMPANY
and UNION PACIFIC RAILROAD COMPANY,
Defendants-Appellants.

Appeal from the Circuit Court of Madison County

No. 93-L-1209

Honorable Daniel J. Stack, Judge Presiding

[Filed: June 10, 1994]

PRESIDING JUSTICE LEWIS delivered the opinion of the court:

The defendants, Missouri Pacific and Union Pacific Railroad Company, appeal from the trial court's entry of a preliminary injunction which prohibits the defendants from "carrying out their practice, policy, and use of letters requiring knowledge and consent of employee witness interviews concerning facts incident to FELA [Federal Employers Liability Act (45 U.S.C. sec. 51 *et seq.* (1993))] claimants' injuries, or in any way interfering with their employees regarding such claims, until further order of [the] Court," the court finding that the practice is void pursuant to section 60 of the FELA (45 U.S.C. sec. 60 (1993)). The defendants also appeal from the trial court's entry of a temporary restraining order (TRO) enjoining the same acts of the defendants as those enjoined under the preliminary injunction.

We consider three issues on appeal: (1) whether the defendants preserved their right to appeal the trial court's denial of their motion to dissolve the TRO; (2) whether the trial court abused its discretion in entering the preliminary injunction; and (3) whether the preliminary injunction is overly broad. For reasons we will more fully state herein, we affirm in part and reverse in part.

Plaintiff, Charles A. Harper, filed a complaint against the defendants on November 19, 1993. The first count alleged negligence under the FELA. The second count asked for a declaratory judgment that the defendants' practice of requiring consent before plaintiffs' attorneys were allowed to talk to railroad employees in the investigations of FELA claims was barred pursuant to section 60. The third count requested temporary and permanent injunctive relief from the defendants' policy of requiring notice of and prior consent to interviews with railroad employees who were witnesses to or who had information concerning FELA claims.

The Federal statute which plaintiff claims the defendants have violated is, *inter alia*, as follows:

> "Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest * * * shall [be subject to criminal penalties.]" 45 U.S.C. sec. 60 (1993) .

I. TEMPORARY RESTRAINING ORDER

On November 22 through 24, 1993, plaintiff's attorney sent written notices of a hearing set for November 24, 1993, to several

different attorneys representing the defendants. Copies of the complaint, including the request for the TRO, were delivered to at least two attorneys for the defendants. Due to the unavailability of the trial judge, no hearing was conducted on plaintiff's request for a TRO on November 24, 1993 . No one appeared for the defendants at the Madison County courthouse on November 24, 1993.

On November 29, 1993, plaintiff's attorney appeared before the trial court, and the TRO was entered, based upon the allegations of the verified complaint and attached affidavits. Plaintiff's attorney informed the trial court that he had called the defendants' law department in St. Louis, Missouri, that morning informing the defendants of the hearing on that date. The trial court entered the TRO, specifically finding that the defendants had actual knowledge of the motion for the TRO but had failed to appear. The TRO enjoined the defendants from "the practice of requiring knowledge and consent of witness/employee interviews concerning facts incident to FELA * * * claimants' injuries or in any way interfering with ex parte communication by plaintiffs' attorneys with its employees regarding such claims." The TRO was entered at 10:30 a.m. on November 29, 1993, and was to remain in effect until December 7, 1993.

On December 6, 1993, the railroad filed a motion for dissolution of the temporary restraining order. On December 7, 1993, before the court began its hearing on plaintiff's request for a preliminary injunction, the trial court heard extensive arguments from both parties concerning the railroad's motion to dissolve the TRO. The trial court denied the motion to dissolve the TRO. On December 7, 1993, the railroad filed its notice of appeal pursuant to Supreme Court Rule 307(a)(1) (134 Ill. 2d R. 307(a)(1)) from the order denying its motion to dissolve the TRO.

Supreme Court Rule 307(a)(1) provides:

> "An appeal may be taken to the Appellate Court from an interlocutory order of court
>
> (1) granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction." (134 Ill. 2d R. 307(a)(1).)

Under subsection (a) of Rule 307, the notice of appeal must be filed within 30 days from the entry of the interlocutory order. 134 Ill. 2d R. 307(a).

Turning now to the issues in the case at bar, it is apparent that whether the defendants had notice or not is irrelevant. The TRO expired by its own terms on December 7, 1993, the day that the trial court denied the defendants' motion to dissolve. In *People v. Conrail Corp.* (1993), 251 Ill. App. 3d 550, 622 N.E.2d 29, the court pointed out:

> "A case becomes moot when, pending the decision on appeal, events occur which render it impossible for the reviewing court to grant effectual relief to any of .the parties. [Citations.] An injunction that has expired can no longer be dissolved because the court can not dissolve that which no longer exists. (*Conrail Corp.*, 251 Ill. App. 3d at 557, 622 N.E.2d at 34.

By the time the notice of appeal from the denial of the motion to dissolve the TRO reached this court, there was nothing to dissolve. Moreover, the preliminary injunction was issued on December 7, 1993, and it superseded the TRO, which would make the TRO moot even if its term had not expired. We need not, therefore, discuss whether the written notices sent by plaintiff to the defendants' attorneys of a hearing asking for a TRO on November 24, 1993, delivery of copies of the complaint to two of the defendants' attorneys, and a telephone call to the defendants' law department on November 29, 1993, to tell counsel of the hearing on that date were sufficient notice to the defendants.

There apparently is some confusion about TROs and about what a defendant must procedurally do to protect and defend against a TRO. (See *People v. Conrail Corp.* (1993), 251 Ill. App. 3d 550, 622 N.E.2d 29; *Williams v. Nagel* (1993), 251 Ill. App. 3d 176, 620 N.E.2d 1376, *appeal allowed* (1994), 154 Ill. 2d 570, 631 N.E.2d 719; *People v. Conrail Corp.* (1993), 245 Ill. App. 3d 167, 613 N.E.2d 784.) It should be noted from the outset that a TRO is a quick, short-term process that is intended to maintain the status quo. It is not meant to be an instrument that causes protracted litigation because of its brief duration due to expiration by its own terms, cessation by law, or supersedence by an order entered in the proceeding for a preliminary injunction. The propriety of the issuance of the TRO becomes moot once the TRO is no longer in existence, except for the question of assessing damages for the wrongful issuance of such. 735 ILCS 5/11-110 (West 1992); *Conrail Corp.*, 251 Ill. App. 3d 550, 622 N.E.2d 29.

There are two types of TROs, those granted with notice to the adverse parties and those that are granted without notice, *ex parte*, to the adverse parties. Either way, relief from a wrongful granting or denial of the TRO should be rendered expeditiously.

Part of the confusion apparently arises from the fact that Rule 307 was amended in 1988, effective January 1, 1989, by the addition of paragraph (d), which provides as follows:

> "(d) Appeals of Temporary Restraining Orders; Time; Memoranda.
>
> (1) *Petition; Service; Record.* Unless another form is ordered by the Appellate Court, review of the granting or denial of a temporary restraining order as authorized in paragraph (a) shall be by petition filed in the Appellate Court, but notice of interlocutory appeal as provided in paragraph (a) shall also be filed, within the same time for filing the petition. *The Petition* shall

be in writing, state the relief requested and the grounds for the relief requested, and *shall be filed in the Appellate Court,* with proof of personal service, *within two days of the entry or denial of the temporary restraining order from which review is being sought.*

(2) *Legal Memoranda* . The petitioner may file a memorandum supporting the petition which shall not exceed 15 typewritten pages and which *must also be filed within two days of the entry or denial of the temporary restraining order.*

* * *

(4) *Time for Decision; Oral Argument.* After the petitioner has filed the petition, * * *, the Appellate Court shall consider and decide the petition within two days thereafter." (Emphasis added.) 134 Ill. 2d R. 307 (d) .

The defendants cite *Bohn Aluminum & Brass Co. v. Barker* (1973), 55 Ill. 2d 177, 303 N.E.2d 1, wherein our supreme court held that the refusal to dissolve a temporary restraining order is appealable under Rule 307(a)(1). Since subsection (d), dealing specifically with TROs, was added to Rule 307 in 1988 (see 107 Ill. 2d R. 307 for the Rule prior to January 1, 1989), subsection (a) has been superseded and, therefore, the *Bohn Aluminum* ruling is no longer applicable to appeals of TROs. All matters pertaining to TROs should comport with the intent and purpose of Rule 307(d), which is to provide a process for a quick review of the granting or denial of a TRO.

The process under Rule 307(d) is clear when a plaintiff has given notice to the defendant of its intent to obtain a TRO and the defendant appears in opposition before the circuit court. The aggrieved party has two days to file its notice of interlocutory appeal and petition in the appellate court.

The process is not so clear where the defendant is given only minimal notice, such as in *American Warehousing Services, Inc. v. Weitzman* (1988), 169 Ill. App. 3d 708, 533 N.E.2d 366, where plaintiff telephoned defendant 30 minutes prior to appearing before the trial court, but where the defendant failed to appear for some reason. The question arises in such a case, assuming that the notice was proper, as to whether the defendant may file a motion to dissolve or must the defendant immediately file its notice of interlocutory appeal and petition in the appellate court? There is no prohibition that we are aware of against the filing of a motion to dissolve in this situation, and in fact, we encourage such because it provides the trial court with the opportunity to void or modify the TRO, if justice requires. Further, it provides an opportunity for the parties to agree to a particular TRO pending the hearing for a preliminary injunction, and thus, an appeal may be avoided. However, in the situation where the defendant had notice of the TRO, the defendant should be prepared to comply with the jurisdictional requirement of Rule 307(d) by filing his notice of appeal and petition in the appellate court within two days of the issuance of the TRO in the event the trial court denies or fails to hear the motion to dissolve within two days of the issuance of the TRO. If the defendant fails to perfect his appeal within two days of the granting of the TRO, this court lacks jurisdiction to hear such.

We next review the situation where a TRO is granted without notice to the adverse party. Section 11-101 of the Code of Civil Procedure provides:

> "On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require." (735 ILCS 5/11-101 (West 1992).)

Rule 307(d) provides that an appropriate supporting record shall accompany the petition for an appeal of a TRO. It would appear that since the adverse party must obtain all the documents, certifications, or affidavits necessary for a supporting record on appeal, the adverse party most likely would avail itself of one more remedy, that is, obtaining a ruling on a motion to dissolve from the trial court before appealing.

May an adverse party, who did not have notice of the hearing in which the TRO was granted *ex parte*, appeal without filing a motion to dissolve if the TRO has been granted more than two days prior to service on the adverse party? We choose not to suggest an answer at this time.

We are also cognizant of Rule 307(b), which provides for appeals when interlocutory orders are entered on *ex parte* applications, provided a motion to vacate the order is first presented to the trial court. Neither party mentions this section, nor would it be applicable, since it also was in existence prior to subsection (d) being added to Rule 307. The 30 days allowed to file an appeal make subsection (b) just as inapplicable and unworkable as subsection (a) for the purposes of expeditious appellate review of TROs.

The plaintiff in the case at bar argues that the defendants, pursuant to Rule 307(d), had to file a notice of interlocutory appeal and a petition in the appellate court within two days of the entry or denial of the TRO, and not the entry of an order denying the motion to dissolve the TRO. This argument does not make sense if applied to an adverse party that had no notice of plaintiff's petition for a TRO. How can one appeal from a TRO of which one is unaware? All a plaintiff would have to do in some cases is to wait two days before service of the TRO on the defendant, and, thus avoid an appeal.

Even if a defendant is made aware of the TRO after its issuance, our reasoning above applies to the filing of a motion to

dissolve whenever a party had notice but failed to appear. Section 11-101 gives the defendant a right to file a motion to dissolve when a TRO is issued without notice. If we force the defendant to appeal within two days of the issuance of the TRO, defendants may lose their right to have the trial court reconsider its ruling, because of the time constraints. Moreover, we wish to give the trial court the opportunity to correct, modify, or void the TRO in order to avoid unnecessary appeals and the difficulties placed on this court by Rule 307(d) of hearing and deciding an appeal within two days. Finally, in many cases, the parties may agree upon the terms of a TRO pending the hearing for the preliminary injunction, thus avoiding an appeal or a miscarriage of justice. Thus, an adverse party to the issuance of an *ex Parte* TRO should file a motion to dissolve in the trial court as soon as possible and seek a hearing on the motion within two days or sooner from the time of service of the TRO. The losing party, including an adverse party that is unable to obtain a ruling, should file its appeal within two days of the adverse party being served with the TRO.

Plaintiff cites *Williams v. Nagel* (1993), 251 Ill. App. 3d 176, 620 N.E.2d 1376, for the proposition that the defendants have no right to appeal from the December 7, 1993, order refusing to dissolve the TRO; rather, plaintiff argues, the defendants had to appeal within two days from the November 29, 1993, issuance of the TRO. Assuming that the defendants had notice of the hearing on November 29, 1993, plaintiff is correct that the defendants had to appeal within two days. However, *Williams* held that the *plaintiffs*, not the defendants, lost their right to appeal by failing to file a petition and notice of appeal within two days of the denial of the TRO. Further, the *Williams* court stated that "an appeal must be filed within two days of the entry of the *order* sought to be reviewed or the right to challenge the *ruling* will be lost." (Emphasis added.) *Williams*, 251 Ill. App. 3d at 179, 620 N.E.2d at 1378.) The *Williams* court did not limit the

right to appeal to only appealing from orders granting the TROs. *Williams*, 251 Ill. App. 3d 176, 620 N.E.2d 1376.

Finally, we need to mention that the defendants filed a document entitled "Appellant's Brief," which consisted of 47 pages of facts and argument, and which was filed in this court on January 14, 1994, over 30 days after the entry of the order denying the motion to dissolve the TRO. The rule is clear that a party appealing from a TR0 or a denial of a motion to dissolve a TRO is required to file a petition, no longer than 15 pages, stating the relief requested and the grounds for relief, *"within two days of the entry or denial of the temporary restraining order from which review is being sought."* (134 Ill. 2d R. 307(d)(1).) The fact that the defendants did not attempt to comply with any of Rule 307(d)'s mandatory requirements as to the time to file the petition deprived this court of jurisdiction to consider the issues raised by the defendants in regards to the TR0.

Parenthetically, we note that plaintiff argues that the defendants' filing of a document entitled "Appellant's Brief, which is 47 pages long, precludes them from appealing the TRO, since the document should be entitled "Petition" and/or "Legal Memorandum," under the provisions of Rule 307(d). (134 Ill. 2d R. 307(d).) While we agree with plaintiff that the railroad failed to comply with the page-limitation and naming provisions of Rule 307(d), those provisions are not jurisdictional. (See Ill. Ann. Stat., ch. 110A, par. 341, Historical and Practice Notes, at 477-78 (Smith-Hurd 1985) (wherein the page limitation and other technical requirements for briefs in appeals from final decisions are discussed).) These requirements are not jurisdictional, but failure to comply may subject the offending party to sanctions within the discretion of the reviewing court. Since "Appellant's Brief" was not timely filed under Rule 307(d), the question of an appropriate sanction in this case is moot.

II. PRELIMINARY INJUNCTION

A. FACTS

On December 7, 1993, the trial court heard evidence in support of plaintiff's request for a preliminary injunction. Plaintiff first called Cornell Phillips, who was a railroad employee from 1984 to 1987. Mr. Phillips described the atmosphere for employees of the railroad as "frightening." He felt that he could not talk to anyone about the accidents of other employees, and he stated that railroad employees were told that they would lose their jobs if they testified as a witness in any other employee's FELA case.

Plaintiff next called Gary Barker, the assistant general chairman for the railroad employees' union. In his job, he dealt with both railroad employees and management. He felt that the railroad had an "on-going attitude to suppress" information from employees regarding accidents and injuries that occurred at work. There was no doubt in Mr. Barker's mind that railroad employees throughout the several States of his representation were intimidated from providing information to FELA claimants or their attorneys concerning job-related injuries.

Mr. Barker felt that the reason the employees are so afraid to talk about other employees' on-the-job injuries is that they fear they will lose their good jobs. Furthermore, the defendants' rules provide that an employee can be disciplined, even fired, for giving information about job-related accidents to someone outside the railroad, even though employees are required to give statements concerning accidents to the railroad.

Barker identified a copy of a letter from one of the defendants' law firms to plaintiff's law firm. The letter stated, in pertinent part:

> "Please be advised that neither you nor anyone else from your firm or at your direction should come onto the property

of Union Pacific Railroad Company, examine or inspect any equipment of Union Pacific Railroad company without our express written consent. In addition, under no circumstances should you or anyone on your behalf communicate directly with any railroad foreman, supervisors, or office personnel about any aspects of the claim of Mr. Harper. Finally, please advise if you wish to interview *any railroad employees* concerning Mr. Harper's claim. Please do not conduct such interviews without our knowledge and consent.

We believe that attorney ethical rules and laws of most states prohibit contact by you or anyone on your behalf from communicating about your client's claim with any person having managerial responsibility for the railroad, with any person whose statement may constitute an admission of the railroad and any person whose act or omission may be imputed to the railroad for purpose of civil liability. We expect you and others acting on your behalf to honor these principles." (Emphasis added.)

Barker testified that he received several other copies of the same form letter addressed to attorneys representing other FELA claimants, since he is the union representative for these employees.

On cross-examination, Barker admitted that he did not remember having personally met the plaintiff in this case, but he stated that he believed he was plaintiff's union representative, given plaintiff's location. Mr. Barker did not have any personal knowledge of any particular witnesses who had been intimidated by the defendants from coming forward to testify on behalf of plaintiff.

Plaintiff next called Norman Stander, a senior claims representative for the defendants, as an adverse witness. Mr. Stander's job requires him to investigate FELA claims. In doing so, he

routinely talks to witnesses outside the presence of the claimants or the claimants' attorneys. Mr. Stander identified a form letter that was used by the defendants throughout the country, which was the same form letter sent to plaintiff's attorney and to Mr. Barker, the union representative. Mr. Stander did not know the reason the defendants required plaintiffs' attorneys to obtain their consent before interviewing witnesses.

Finally, Roger Denton, an attorney from the law firm representing plaintiff, testified that his practice is limited primarily to representing plaintiffs in FELA litigation. In his eight years of practice, he has always interviewed all "rank-and-file" railroad employees without the prior knowledge or consent of the railroad, and that is the practice of all other attorneys who represent FELA claimants, as far as he knows. He has not found it useful to try to talk to managerial railroad employees, because he has learned that they normally will not talk to him, but he feels that section 60 gives him the right to interview any and all railroad employees if he so desires. He and his law firm stopped interviewing witnesses on FELA cases after they started receiving the form letters from the railroad requiring prior knowledge and consent before these interviews, since they took the threat of having to defend disciplinary actions very seriously.

Mr. Denton additionally testified that plaintiff's injury is a repetitive-trauma injury, resulting in carpal tunnel syndrome, and that there are no occurrence witnesses to any singular event causing plaintiff's malady, but only witnesses who worked alongside plaintiff and observed him working on equipment that required the same physical maneuvers repetitively over the years.

Defendants did not put on any evidence.

B. LAW

When the appellate court reviews the issuance of a preliminary injunction, the sole issue is whether the trial court abused its

discretion. (*Board of Trustees of Community College District No. 508 v. Bakalis* (1980), 80 Ill. App. 3d 502, 400 N.E.2d 47.) If the trial court had a legal basis for granting the injunction, no abuse of the trial court's discretion will be found. (*City of Chicago v. Airline Canteen Service, Inc.* (1978), 64 Ill. App. 3d 417, 380 N.E.2d 1106.) Whether to issue a preliminary injunction is within the sound discretion of the trial court upon a *prima facie* showing of necessity. *Stasica v. Hannon* (1979), 70 Ill. App. 3d 785, 388 N.E.2d 1110.

A *prima facie* case of necessity is established when the party seeking the preliminary injunction presents evidence that (1) it has a clearly ascertained right which is in need of protection; (2) it will suffer irreparable injury without that protection; (3) it has no adequate remedy at law; and (4) it is likely to be successful on the merits. (*Rotary Club v. Harry F. Shea & Co.* (1983), 120 Ill. App. 3d 988, 458 N.E.2d 1002.) The correct purpose of a preliminary injunction is to preserve the status quo or that state of affairs legally existing just prior to the motion for preliminary injunction. (*Rotary Club*, 120 Ill. App. 3d 988, 458 N.E.2d 1002.) In deciding whether to grant preliminary injunctive relief, the trial court should not decide contested issues of fact, nor should it decide the merits of the case. By the same token, the appellate court should consider the substantive issues only to the extent necessary to determine if the trial court abused its discretion. *Rotary Club*, 120 Ill. App. 3d 988, 458 N.E.2d 1002.

The defendants argue that plaintiff did not establish the four factors necessary to the issuance of a preliminary injunction. As to the first factor, the defendants contend that plaintiff did not establish a clearly protectable interest, in that section 60 does not grant plaintiffs' attorneys the right to conduct *ex parte* interviews of managerial employees of the defendants or the right to come onto railroad property.

Section 60 was designed to prevent any direct or indirect chill on the availability of information to any party in interest in an

FELA claim. (*Cavanaugh v. Western Maryland Ry. Co.* (4th Cir. 1984), 729 F. 2d 289.) "Therefore, the Act [FELA] is to be read liberally." (*Cavanaugh*, 729 F.2d at 293.) The courts have consistently held that a FELA claimant's attorney is a "person in interest" within the meaning of section 60. (*Sheet Metal Workers International Association v. Burlington Northern R.R. Co.* (8th Cir. 1984), 736 F.2d 1250.) When it enacted section 60, Congress recognized the likelihood that railroad agents would coerce or intimidate employees to prevent them from testifying against the railroad. *Hendley v. Central of Georgia R.R. Co.* (5th Cir. 1980), 609 F.2d 1146.

We cannot conceive, nor is it seriously suggested by the defendants, that there is any purpose for sending the form letters to all FELA claimants' attorneys other than to restrict claimants' attorneys from obtaining information from railroad employees about the facts incident to the injury or death of an employee. The defendants maintain that they have the right to restrict plaintiffs' attorneys from interviewing certain employees and the right to restrict the time and place of such interviews, but they do not dispute that they intended to restrict plaintiffs' attorneys' access to information. The trial court, therefore, did not abuse its discretion in finding that the defendants' policy of mailing form letters to all FELA claimants' attorneys was an attempt to restrict the attorneys' unfettered access to information regarding FELA claims, and that this policy effectively restricted employee information as to the facts incident to employees' injuries. *Stack v. Chicago, Milwaukee, St. Paul & Pacific R.R. Co.* (1980), 94 Wash. 2d 155, 615 P.2d 457.

In fact, the railroad does not deny that the portion of the letter requiring prior knowledge and consent of the railroad before an attorney interviews "any railroad employees" is a clear violation of section 60. The railroad merely cites Illinois Rules of Professional Conduct, Rule 4.2 (134 Ill. 2d R. 4.2), which regulates communication with persons represented by counsel, in support

of their contention that plaintiffs' attorneys do not have the right to conduct *ex parte* interviews with managerial employees. However, the defendants admit that the provisions of section 60 preempt State law to the extent of any conflict in the two rules.

Further, section 60 in no way attempts to distinguish between managerial employees and other railroad employees. If Congress intended such, it could and should have set forth the distinction between classes of employees in section 60 or provided for the various States to make exceptions for certain classes of employees. Managerial employees could be witnesses to an accident or they may be aware of certain practices or equipment of the railroad that may be dangerous to its employees. If any employee of the railroad, whether they be management, clerical, or a common laborer, wishes to talk to claimants' counsel, section 60, by its very breadth, prohibits any act by the defendants to effectuate a coverup or to make discovery of the causes of the accident more difficult.

Given the purposefully broad language of section 60 and the courts' uniformly liberal construction of that language, we find that the trial court was within its sound discretion in finding that any State statute or rule, including the Rules of Professional Conduct (134 Ill. 2d R. 1.1 et seq.), that prohibits plaintiffs' attorneys from conducting *ex parte* interviews with the defendants' employees regarding facts incident to FELA claimants' injuries is preempted by Federal law. (See *Mondou v. New York, New Haven, & Hartford R.R. Co.* (1911), 233 U.S. 1, 32 S.Ct. 169.) The defendants cite *Lake v. Orgulf Transport Co.* (W.D. Tenn. 1993), 1993 W.L. 194096, where, in a case with similar facts and a similar letter, the district court indicated that plaintiff's counsel may not have the right to interview corporate employees whose position gives them the legal authority to bind the corporate defendants. This indication by the district court was *dicta*, and there was no discussion as to why certain employees should be treated differently under section 60. We choose not to read

something into section 60 that is contrary to the purpose and clear language of section 60. Therefore, the trial court was clearly within its sound discretion in finding that the defendants' "use of letters instructing plaintiff's counsel not to conduct interviews of its employees without its knowledge or consent" was void under section 60.

The defendants next argue that plaintiff did not establish that he would suffer irreparable harm without the preliminary injunction. The defendants assert that plaintiff's evidence did not establish that any particular employees had been intimidated from giving information to plaintiff's attorney. We do not agree. Plaintiff's attorney testified that his law firm had stopped their usual and customary practice of interviewing all rank-and-file employees regarding FELA claims against the railroad as a result of the letters received from the railroad and especially due to the threat of ethical charges against the law firm.

We do not accept the defendants' argument that there is no irreparable harm to plaintiff because his attorney has not yet been brought up on disciplinary charges. Even if plaintiff's law firm were ultimately vindicated, that does not cure the harm in this case. The threat of ethical charges has been sufficient to chill the attorney's customary practice of interviewing any railroad employee who is willing to talk to the attorney and who has information concerning an FELA claim. Furthermore, the evidence was clear that, generally, railroad employees are afraid to talk to plaintiff's attorneys in FELA actions, for fear of losing their jobs. The defendants' message to plaintiff's attorney and the union representative can only serve to further inhibit any potential witness from voluntarily providing information to persons who have an interest in the FELA claim, in violation of section 60. There was, therefore, sufficient evidence of irreparable harm.

The railroad next argues that plaintiff did not demonstrate that his remedy at law was inadequate. However, the only remedy the

railroad posits is a protective order regulating discovery under Supreme Court Rule 201(c)(1). (134 Ill. 2d R. 201(c)(1).) We do not see why a claimant must seek the protection of a protective order under our discovery rules, when there is a Federal criminal statute available and directly on point. Nor should our discovery rules abrogate a plaintiff's remedy of injunctive relief that has been established by the courts under section 60. See *Hendley v. Central of Georgia R.R. Co.*, (5th Cir. 1980), 609 F.2d 1146.

The harm from the defendants' actions is more likely to arise in the phases of the lawsuit prior to discovery than afterwards. It is elementary that an attorney cannot schedule depositions or frame intelligent interrogatories without having some basic information about the facts of the case, which the attorney often cannot obtain satisfactorily from the claimant alone. Section 60 is a broad protection for FELA attorneys and claimants in their indispensable search for the information necessary to FELA actions. Not only is injunctive relief authorized under section 60 in a case such as this, it is often necessary to accomplish the purpose of the FELA, which is to protect claimants' access to information concerning FELA claims. (*Hendley*, 609 F. 2d 1146; Senate Report Number 661, 76th Congress, 1st Session 2, 5 (1939).) Thus, the trial court did not abuse its discretion in finding that plaintiff did not have an adequate remedy at law.

The defendants additionally argue that plaintiff failed to establish a likelihood of success on the merits. The railroad claims that the evidence did not establish a *prima facie* case that its actions had the effect of inhibiting any particular witnesses from coming forward on this plaintiff's claim. We disagree. Plaintiff did more than establish a *prima facie* case as to himself. He established, by the requisite standard of a preponderance of the evidence (*Rotary Club*, 120 Ill. App. 3d 988, 458 N.E.2d 1002), that the general atmosphere of the railroad intimidates employees from voluntarily furnishing evidence to FELA claimants and their attorneys.

The form letter, sent by the defendants to all FELA claimants' attorneys, could do nothing other than further inhibit employees, including those that would be potential witnesses in plaintiff's case. By the defendants' logic, plaintiff would be required to find the witnesses that were already inhibited from testifying in his case in order to show a likelihood of success on the merits. If plaintiff had the ability to find and talk to these witnesses, as the defendants argue he should have, then, indeed, he would not have had to resort to the court for an injunction. The trial court did not abuse its discretion in finding that there was a likelihood of success on the merits based upon the evidence presented.

III. SCOPE OF THE PRELIMINARY INJUNCTION

The defendants claim that the scope of the preliminary injunction is overly broad. To the extent that the preliminary injunction applies across the board to plaintiff's attorneys and allows them free access to conduct unrestricted, *ex parte* interviews of any and all railroad employees, we agree. The statements in the preliminary injunction that we find objectionable are as follows:

> "2. Schlicter, Bogard & Denton and their agents may conduct ex parte interviews of Defendant's employees regarding facts incident to FELA claimants' injuries.
>
> * * *
>
> 4. Defendants and their representatives are hereby enjoined and restrained from * * * in any way interfering with ex parte communication by Plaintiff's attorneys with their employees regarding such claims * * *."

The problem with the preliminary injunction is that the defendants could be held in contempt for restricting plaintiff's attorneys from seeking to interview railroad employees during their working hours. Even plaintiff's attorney testified that he did not normally seek to interview employees during their working hours. The defendants have a right to conduct their business in

a safe manner without worrying about plaintiff's attorneys disrupting that work. Therefore, to the extent that the preliminary injunction gives plaintiff's attorneys rights to conduct *ex parte* interviews of any railroad employee at any time or any place, we reverse and remand with directions to the trial court to limit the scope of the preliminary injunction so that it prohibits the defendants from interfering with any *ex parte* communications by plaintiff's attorneys with defendants' employees, except when on defendants' property or during the working hours of said employees.

Affirmed in part; reversed in part and remanded with directions.

GOLDENHERSH, J., and MAAG, J., concur.

APPENDIX D

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

CAUSE NO. 93-L-1209

CHARLES A. HARPER,
Plaintiff,

v.

MISSOURI PACIFIC RAILROAD COMPANY
and UNION PACIFIC RAILROAD COMPANY,
Defendants.

[Filed: June 30, 1995]

PERMANENT INJUNCTION ORDER

This Court, having heard evidence and arguments of counsel, finds as follows:

1. That this Court has jurisdiction over the subject matter and the parties herein.

2. That Plaintiff has filed an action requesting that this Court declare that Plaintiff's attorneys, Schlichter, Bogard & Denton and their agents, have the right to interview employee witnesses of the Defendants ex parte who have knowledge of facts incident to an injury of a person brought pursuant to 45 U.S.C. 51 *et. seq.* (FELA). Plaintiff alleges that Defendants' practice of requiring its knowledge and consent to employee witness interviews is void pursuant to 45 U.S.C. 60.

3. 45 U.S.C. 60 provides in part that "any . . . device whatsoever, the purpose, intent or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to facts incident to the injury

or death of any employee, shall be void. . . ." The purpose of 45 U.S.C. 60 is to equalize the access to information available to the claims departments of railroads and to individual FELA claimants and their representatives. *Stark v. Burlington Northern Railroad Company*, 538 F.Supp. 1061, 1062 (D.C. Col. 1982). Any action or device of the railroad which effectively restricts employee information as to the facts incident to any employees' injury is prohibited. *Stack v. Chicago Minneapolis-St. Paul and Pacific Railroad Company*, 615 P.2d 457, 461 (Wash. 1980). Attorneys who represent employees asserting FELA claims or "persons in interest" pursuant to 45 U.S.C. 60. *Sheet Metal Workers International Association v. Burlington Northern Railway Company* , 736 F.2d 1250, 1251-52 (8th Cir. 1984).

4. This Court finds that Union Pacific Railroad/Missouri Pacific Railroad has instituted a new policy requiring its notice and consent to interviews of its employee witnesses by Plaintiff's attorneys and other attorneys about facts incident to an FELA claim. This policy of the Union Pacific/Missouri Pacific is being applied to Charles Harper, Plaintiff herein, and to other FELA claimants who are injured while working for Union Pacific/ Missouri Pacific. Attorneys representing the railroad have corresponded with counsel for Plaintiff indicating that railroads' counsel has an ethical obligation to report any ex parte interviews of employee witnesses to the Disciplinary Commission.

5. This Court finds that an actual controversy exists between this Plaintiff and his representatives, and other Plaintiffs' counsel representing injured employees in FELA matters against the Union Pacific/Missouri Pacific Railroad, and the Union Pacific/ Missouri Pacific Railroad. Plaintiff has standing to bring this action because he has incurred, and continues to incur, direct harm as a result of Defendants' policy and practice, and he has a substantive interest in the protection afforded by 45 U.S.C. 60.

6. This Court finds, based on the evidence, that Defendants Union Pacific Railroad Company and Missouri Pacific Railroad

Company have threatened employees who are witnesses to on-the-job injuries, that the effect of such threats is to coerce and intimidate employee witnesses, hindering their willingness to come forward with information about such injuries.

7. This Court further finds that the Defendants have created an atmosphere of intimidation of employees who have knowledge regarding on-the-job injuries, and that such atmosphere has caused some employees to refuse to talk to injured employees' representatives, and to limit their voluntary furnishing of information to employees' representatives. There exists on the part of employees of the Union Pacific/Missouri Pacific Railroad a fear of discipline or discharge if an employee voluntarily furnishes facts incident to an FELA claimant's injuries to the claimant's representatives. Representatives of the railroad, including attorneys representing the railroad, can and have intimidated employee witnesses from voluntarily providing information to claimants' representatives.

8. This Court finds that the purpose and effect of the policy of requiring Defendants' knowledge or consent before employees may be interviewed by injured parties' representatives is to prevent the free flow of information to injured employees and their representatives in violation of 45 U.S.C. 60 and that no adequate remedy at law exists to remedy this situation.

9. Defendants' attorneys, by sending letters suggesting that Plaintiff's counsel is acting unethically by conducting ex parte interview of Defendants' employees, are intimidating the representatives of FELA claimants, and this practice has the effect of preventing employee witness to on-the-job injuries from voluntarily furnishing information to claimants' attorneys, in violation of 45 U.S.C. 60. This Court finds that this is a veiled threat to Plaintiff's counsel, is ongoing and has a chilling effect on the interviewing of witnesses and, therefore, inhibiting the flow of voluntary information from witnesses.

10. Unless Defendants' policy and practice of requiring its knowledge and consent in order for FELA claimant's representative to interview Defendants' employees regarding facts incident to an injury, this Plaintiff, as well as other injured claimants, and Defendants' employees who have knowledge regarding on-the-job injury claims, will be irreparably harmed because their right to have the free flow of information regarding facts incident to FELA claims will be impaired, and cannot be remedied. It is not likely that once a witness has been intimidated, this can be reversed. Plaintiff has no adequate remedy at law.

11. This Court finds that it has long been the practice of FELA claimants' attorneys and their representatives to interview Defendants' employees without the knowledge and consent of the Defendants' and Defendants' new policy, practice, and letters of its attorneys, has and will continue to have, the effect of disrupting this long standing practice of ex parte interviews if this Court does not enjoin the policy and practice.

12. Based on the record before this Court, Plaintiff has shown that a permanent injunction is necessary to maintain the status quo between the parties and their representatives and continue to allow the free flow of information between FELA claimants' attorneys and Defendants' employee witnesses protected by 45 U.S.C. 60. Injunctive relief is available under 45 U.S.C. 60 . *Hendley v. Central of Georgia Railroad*, 49 F.2d 1146, 1152 (5th Cir. 1980). In absence of this Court granting the injunction, Plaintiff and his representatives will suffer greater harm without the injunction than Defendants will suffer if it is issued. That is, Plaintiffs and their counsel, will be inhibited from conducting interviews of witnesses without the injunction, and with the injunction, the investigation of claims will remain in the same manner that existed before this controversy arose. Defendants will not be harmed by the requested injunctive relief.

IT IS, THEREFORE, THE ORDER OF THIS COURT THAT

1. Defendants' practice, pclicy, and use of letters, instructing Plaintiff's counsel not to conduct interviews of its employees without its knowledge or consent who have knowledge of £acts incident to an FELA claimant's injury, is void pursuant to 45 U.S.C. 60.

2. Schlichter, Bogard & Denton and their agents may conduct ex parte interviews of Defendants' employees regarding facts incident to FELA claimants' injuries, except when on defendant's property or during the working hours of said employees.

3. Any state statute or rule that would prohibit Plaintiff's counsel from conducting ex parte interviews with Defendants' employees regarding facts incident to FELA claimants' injuries, is preempted by federal law. 45 U.S.C. 60.

4. Defendants and their representatives are hereby enjoined and restrained from carrying out their practice, policy, and use of letters requiring knowledge and consent of employee witness interviews concerning facts incident to FELA claimants' injuries, or in any way interfering with ex parte communication by Plaintiff's attorneys with their employees regarding such claims, except when on defendant's property or during the working hours of said employees.

SO ORDERED:

/s/ Daniel J. Stack

DATED: JUNE 30, 1995

APPENDIX E

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

CAUSE NO. 93-L-1209

CHARLES A. HARPER,
Plaintiff,

v.

MISSOURI PACIFIC RAILROAD COMPANY
AND UNION PACIFIC RAILROAD COMPANY,
Defendants.

[Filed: June 30, 1995]

ORDER

On Plaintiff's Petition for a Contempt of Court Order this Court having previously issued its order directing Defendants Union Pacific Railroad Company and Missouri Pacific Railroad Company to show cause why they should not be held contempt of court and the Court having heard evidence on the matter, this Court makes the following findings:

1. That on December 9, 1993, this Honorable Court entered a Preliminary Injunction Order finding Defendants' policy of requiring consent to attorney interview with their employees regarding employee injuries to be a violation of U.S.C. Sec. 60.

2. That this Court's Order stated: "Defendants' practice, policy and use of letters instructing Plaintiff's counsel not to conduct interviews of its employees without knowledge or consent who have knowledge of facts incident to an FELA claimant's injury, is void pursuant to 45 U.S.C. Sec. 60."

3. That this Court further stated, "Schlichter, Bogard & Denton and their agents may conduct ex parte interviews of Defendants' employees regarding facts incident to FELA claimants' injuries."

4. That this Court ordered "Defendants and their representatives are hereby enjoined and restrained from . . . requiring knowledge and consent of employee witness interviews concerning facts incident to FELA claimants' injuries, or any way interfering with ex parte communication by Plaintiff's attorneys with their employees regarding such claims, until further order of this Court."

5. That Defendant railroads were present in court, served with and fully aware of said preliminary injunction Order.

6. That regardless, Defendants repeatedly violated the Order and sent letters to claimants' attorneys, including Plaintiff's attorneys, instructing them not to conduct interviews of their employees without their knowledge or consent.

7. That Defendants deliberately chose to continue their policy enjoined in the December 9, 1993, Order of this Court.

8. On May 26, 1994, as a result of said behavior, this Court held Defendants in contempt of court.

9. This Court found Defendants' contempt "to be a serious rejection of [its] authority" and "a continuation of [Defendants'] intimidation of persons with knowledge regarding injury claims of [D]efendants; employees."

10. That, since the entrance of this Court's contempt Order, this Court finds that Defendants have revised, effective April 10, 1994 their rule regarding employee statements.

11. That Defendants promulgated said revision with full knowledge of the Preliminary Injunction entered by this Court on December 9, 1993.

12. Defendants' former rule regarding statements, Rule 807(2), provided that:

Except when authorized by property authority:

> (2) Information as to the fact pertaining to the injury or death of an employe[e] must not be furnished to anyone except a person in interest, such as the injured employe[e], or an immediate relative of the injured or deceased employe[e], or to an officer of the law.

13. This Court, in its Preliminary Injunction Order dated December 9, 1993, noted that attorneys who represent employees asserting FELA claims are "persons in interest" pursuant to 45 U.S.C. Sec. 60. *Sheet Metal Workers Int'l Ass'n. v. Burlington Northern Ry. Co.*, 736 F.2d 1250, 1251 (8th Cir. 1984).

14. Thus, pursuant to former Rule 807, employees were allowed to furnish information about the facts concerning the injury or death of an employee to claimant's attorneys.

15. That Defendants' revised rule regarding statements Rule 1.2.6 provides otherwise. Pursuant to Rule 1.2.6: Except when authorized by the proper manager.:

> Information about the facts concerning the injury or death of an employee may be given only to the injured employee, an immediate relative of the injured or deceased employee, an authorized representative of the railroad, or an officer of the law.

See Exhibit 1.

16. That Defendants', in revising said rule regarding statements, eliminated the clause "persons in interest."

17. That the effect of said revision is to prohibit employees from communicating knowledge of facts relating to employees' injuries to both Plaintiff's attorneys or other claimants' attorneys without Defendants' authorization.

18. That Defendants' implementation of said revision constitutes a willful and flagrant violation of this Court's Preliminary Injunction Order, which enjoined Defendants from "requiring knowledge and consent of employee witness interviews concerning facts incident to FELA claimants injuries."

IT IS THEREFORE, THE ORDER OF THIS COURT, THAT:

a) Defendants Union Pacific Railroad Company and Missouri Pacific Railroad Company by, on, or before July 15 1995, shall send a copy of this Order and a letter in identical form to that attached hereto as Exhibit 1, to each and every one of their employees.

b) The letters set forth in the paragraph immediately above shall be sent by certified mail, return receipt requested.

c) Defendants shall not seek to discipline, reprimand, suspend, terminate from employment or otherwise harass any employee as a result of that employee's actions in providing information or facts pertaining to the injury or death of an employee to that employee's attorney.

d) Defendants shall rescind Rule 1.2.6 or revise it consistent with this Order.

e) Defendants shall report in a letter to the Court by July 31, 1995, on their compliance with this Order.

f) Defendants shall pay to Plaintiff the sum of $150 per day for every day since April 10, 1994 through the day the rule is rescinded or revised as per this Order

g) A copy of this Order shall be mailed to: Jerome J. Schlichter, Attorney for Charles A. Harper, Schlichter, Bogard & Denton, 100 South 4th Street, Suite 900, St. Louis, Missouri 63102; and Mr. Thomas E. Jones, Attorney for Union Pacific Railroad Company, Walker & Williams, 4343 West Main, Belleville, Illinois 62223.

SO ORDERED, this 10th day of June, 1995.

/s/ Daniel J. Stack
DANIEL J. STACK
JUDGE OF THE
CIRCUIT COURT

EXHIBIT 1

"Enclosed is a copy of a Order entered on January 5, 1995 by the Honorable Daniel J. Stack of the Circuit Court for the Third Judicial Circuit, Madison County, Illinois. The Missouri Pacific Railroad Company and the Union Pacific Railroad Company have been enjoined by the Court from in any way preventing you from providing information about employee injuries to the injured employee's attorney and have been ordered to rescind or revise Rule 1.2.6 regarding furnishing information. You should disregard any rule promulgated or adopted by the company which prevents you from providing information about employee injuries to their attorneys. Specifically, Rule 1.2.6 regarding statements should be disregarded."

MOTION FILED
APR 2 1997

(2)

No. 96-1393

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

MISSOURI PACIFIC RAILROAD COMPANY/
UNION PACIFIC RAILROAD COMPANY,
Petitioners,

v.

CHARLES A. HARPER,
Respondent.

On Petition for a Writ of *Certiorari* to the Appellate Court of Illinois, Fifth District

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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CHARLES A. HARPER,
Respondent.

On Petition for a Writ of *Certiorari* to the Appellate Court of Illinois, Fifth District

---

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The Association of American Railroads (AAR) respectfully moves for permission to file the attached brief *amicus curiae*. This motion is filed under Rule 37.2(b). Petitioners, Missouri Pacific Railroad Company and Union Pacific Railroad Company, have consented to AAR's filing of a brief.[1] Respondent, Charles A. Harper, has refused consent.

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR seeks to file a brief *amicus curiae* only when the case presents an issue of great significance to

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[1] The letter expressing consent has been filed with the Clerk of the Court.

the railroad industry as a whole—and in those instances such requests have been granted.[2]

This case, arising under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, presents such an issue. Commonly, attorneys representing FELA plaintiffs seek to interview employees of the defendant railroad without obtaining the consent of, or even advising, the railroad's counsel. This practice is in violation of state ethical rules prohibiting *ex parte* communications. While in some cases railroads have successfully challenged this practice, some courts have exempted plaintiffs' counsel from state ethical rules, holding that such rules are preempted by § 60 of FELA. This issue, which directly impacts a railroad's ability effectively to defend FELA suits, is one of increasing significance to the railroad industry.

When AAR appears before a court as *amicus curiae* in an FELA case it brings a broad, industry-wide perspective to the issue. This perspective often is different from that of the individual litigant, who may not be in a position fully to be aware of a case's impact on the industry as a whole.

Because of its long involvement with FELA, AAR is in an excellent position to address questions arising under that unique statute. AAR conducts an annual survey of the FELA experience of its member railroads, and compiles and maintains the results. This represents, to AAR's knowledge, the most comprehensive database on FELA costs and trends in existence.[3]

AAR works closely with its member roads' litigation counsel on problems associated with FELA. AAR also

---

[2] *E.g.*, *Metro North Commuter R.R. v. Buckley*, 79 F.3d 1337, *cert. granted* Nov. 1, 1996; *Monessen Southwestern Ry. v. Morgan*, 486 U.S. 330 (1988); *Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454 (1987).

[3] *See* ASSOCIATION OF AMERICAN RAILROADS, CLAIM & LITIGATION REPORT (published annually).

maintains a close liaison with the National Association of Railroad Trial Counsel, a 1200 member organization of attorneys representing railroad companies in personal injury litigation. As a result, AAR is thoroughly familiar with the trends and problems associated with FELA.

AAR has spearheaded railroad industry legislative efforts to bring treatment of railroads in the area of employer liability into conformity with all other industries, which are covered by no-fault workers' compensation laws. During the course of these efforts, AAR has worked with the shortline and regional railroads, as well as the commuter authorities, all of whom are also governed by FELA, but whose perspectives may be somewhat different from the large freight roads which mostly constitute AAR's membership. Consequently, AAR has become familiar with the impact of FELA on all components of the rail industry.

AAR's primary interest with regard to FELA in the judicial arena is to prevent courts from expanding railroad liability beyond FELA's intent. While FELA is a unique statute, it does not impose boundless liability on railroads: except where it evidences a congressional intent to depart from the common law, liability is circumscribed by common law doctrines. Lower courts sometimes fail to appreciate this fact. Moreover, the problem is compounded by FELA's liberal venue provision, which affords plaintiffs wide latitude in selecting the site of litigation, as well as the ability to bring and maintain an action in state court. Thus, aberrant state court decisions can have a far reaching impact. So long as Congress continues to keep this regime in place, railroads will avail themselves of their legal rights in an effort to limit their liability, and AAR will support those efforts.

In this case, the lower court's ruling that the plaintiff's counsel was unconstrained by state ethical rules has a significant adverse impact on the defendant. Moreover, given the numerous railroads that do business in Illinois,

this decision, which is at odds with rulings of other courts, will impact a significant portion of the railroad industry, not just the individual railroad involved. In this case, as in others, AAR can play a valuable role in bringing the railroad industry's perspective to the Court's attention.

For these reasons, leave to file the attached *amicus curiae* brief should be granted.

Respectfully submitted,

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April 2, 1997

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IN THE

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OCTOBER TERM, 1996

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MISSOURI PACIFIC RAILROAD COMPANY/
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v.

CHARLES A. HARPER,
Respondent.

On Petition for a Writ of *Certiorari* to the Appellate Court of Illinois, Fifth District

---

BRIEF OF AMICUS CURIAE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF THE PETITION

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 77 percent of the rail industry's line haul mileage, produce 93 percent of its freight revenues, and employ 91 percent of rail employees. AAR represents its members in proceedings before Congress, the courts and administrative agencies in matters of common interest.

One such matter is the Federal Employers' Liability Act (FELA). In 1908, before enactment of any no-fault workers' compensation statutes in this country, Congress structured a tort-based remedy for railroad employees in-

jured on the job. Subsequently, every state has enacted a workers' compensation law, under which concepts of negligence have been eliminated and insurance-type benefits are provided to injured workers.[1]

Each year several thousand FELA lawsuits are filed against AAR members, and many more claims are settled before a suit is filed. In 1995, for example, 5,790 lawsuits were brought.[2] AAR's members expend substantial sums of money defending FELA claims, and paying out FELA settlements and verdicts—far more, by any reasonable standard of comparison, than is spent by other industries as compensation for work-related injuries.[3]

In the case below, the railroad sought to avail itself, through enforcement of the local rules of professional responsibility, of the same protection all represented corporate parties enjoy in litigation: the right to be advised of opposing counsel's desire to interview its employees about a matter in litigation and to be present at those interviews. The railroad was denied this protection by the trial court on the grounds that § 60 of FELA preempts any obligations imposed on plaintiff's counsel by

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[1] Seamen are covered under FELA by virtue of 46 U.S.C. § 688. All other industries in the United States are covered by either state or federal no-fault workers' compensation systems.

[2] ASSOCIATION OF AMERICAN RAILROADS, 1995 CLAIM & LITIGATION REPORT 3-3 (May 1996). (CLAIM AND LITIGATION REPORT). This report contains data on AAR member railroads' FELA experiences compiled from annual surveys.

[3] Private industry as a whole pays about $0.36 per employee hour worked under state workers' compensation, GENERAL ACCOUNTING OFFICE, INTERCITY PASSENGER RAIL: FINANCIAL AND OPERATING CONDITIONS THREATEN AMTRAK'S LONG-TERM VIABILITY 59 (1995), compared to nearly $2.00 for railroads. CLAIM & LITIGATION REPORT at 2-2. Over the past five years, railroads have spent, on average $1.2 billion on FELA annually, or nearly 3.7 percent of their gross revenues. CLAIM & LITIGATION REPORT, (Calendar years 1991, 1992, 1993, 1994 and 1995).

state ethical rules to refrain from making *ex parte* contacts. That ruling was affirmed by the court below.

The lower courts remain badly divided over this issue, which recurs frequently in FELA litigation.[4] In some FELA cases, through enforcement of state ethical rules, railroads have successfully prohibited plaintiffs' counsel from making *ex parte* contacts with employees of the company. However, in other cases courts have read § 60 as giving plaintiffs' counsel carte blanche to contact rail employees without notifying or seeking the consent of railroad counsel.

AAR members, and their counsel, have a strong interest in the resolution of this matter, which has a significant impact on their ability effectively to defend FELA cases.

STATEMENT OF THE CASE

Amicus adopts the statement of the case in Petitioners' brief.

SUMMARY OF THE ARGUMENT

The court below held that § 60 of FELA preempts state rules which prohibit attorneys from making *ex parte* contacts with represented parties, exempting FELA plaintiffs' counsel from the ethical standards that govern all other attorneys. The broad preemptive sweep given § 60 is unwarranted. The legislative history makes clear that Congress' intent in enacting § 60 was to eliminate certain

---

[4] *Compare Tucker* v. *Norfolk & Western Ry.*, 849 F.Supp. 1096 (E.D. Va. 1994); *Branham* v. *Norfolk & Western Ry.*, 151 F.R.D. 67 (S.D. W.Va. 1993); *Queensberry* v. *Norfolk & Western Ry.*, 157 F.R.D. 21 (E.D. Va. 1993); *State ex rel. Atchison, Topeka & Santa Fe R.R.* v. *O'Malley*, 888 S.W.2d 760 (Mo. App. 1994) (holding that § 60 does not permit *ex parte* communications) with *Blasena* v. *Consolidated Rail Corp.*, 898 F.Supp. 282 (D.N.J. 1995); *United Transp. Union* v. *Metro-North Commuter R.R.*, 1995 U.S. Dist. LEXIS 15989 (S.D.N.Y. 1995); *Norfolk Southern Ry.* v. *Thompson*, 430 S.E.2d 371 (Ga. App. 1993) (holding that § 60 permits plaintiffs' attorneys to make *ex parte* communications).

railroad practices that were then commonly used to prevent rail employees and their representatives from obtaining access to needed information, not to give one side an advantage by exempting it from the general rules of conduct that govern litigation. Moreover, no incompatibility exists between state ethical rules prohibiting *ex parte* contacts and the purposes of § 60. As a number of courts have recognized, plaintiffs' counsel may avail themselves of the established discovery process to obtain the information needed to prepare a case.

Failure to resolve the question presented by this case will have a significant impact on the railroad industry, which defends several thousand FELA suits every year. Contacting rail employees without the consent of railroad counsel is commonly attempted by FELA plaintiffs' counsel, and the lower courts remain divided on whether this practice is sanctioned by FELA. The inability of a railroad to prevent *ex parte* communications makes it exceedingly difficult for its counsel to prepare an effective defense. Only a definitive ruling by this Court on the preemptive scope of § 60 will clarify the rules of litigation in FELA cases.

ARGUMENT

I. THIS COURT SHOULD RULE ON THE PREEMPTIVE EFFECT OF SECTION 60 OF FELA TO CLEAR UP THE CONFUSION THAT EXISTS IN THE LOWER COURTS

A. Section 60 of FELA Does Not Preempt State Rules Prohibiting *Ex Parte* Communications

The court below considers that the standards for ethical conduct by attorneys in FELA cases differ from those governing attorneys in all other cases. It would permit FELA plaintiffs' attorneys to make *ex parte* contacts with employees of a railroad defendant on the grounds that § 60 of FELA preempts any state ethical rules barring

ex parte contacts.[5] Section 60, enacted as part of the 1939 amendments to FELA, prohibits "[a]ny contract, rule, regulation, or device whatsoever, the purpose, intent or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee . . ."[6]

The broad preemptive sweep given § 60 by the court below is unwarranted. The legislative history makes clear that Congress' intent in enacting § 60 was to eliminate certain railroad practices that were then commonly used to prevent rail employees and their representatives from obtaining access to needed information.[7] In outlawing any "contract, rule, regulation or device", § 60 refers to any railroad scheme or policy designed to thwart communication by employees, not a state rule or law of general applicability.[8]

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[5] Here, Petitioner was attempting to enforce Rule 4.2 of the Illinois Rules of Professional Conduct. This rule, like those adopted by most states, prohibits a lawyer from communicating with a party the lawyer knows to be represented by another lawyer without obtaining the consent of the other lawyer.

[6] If the ruling below is correct, then railroad counsel would, in theory, be unrestrained by ethical rules from seeking *ex parte* contacts with an FELA plaintiff since § 60 is neutral on its face with respect to who is covered.

[7] ". . . a substantial number of the railroads subject to the Federal Employers' Liability Act have promulgated rules which prohibit employees from giving information concerning an accident to anyone excepting certain specified company officials and claim agents. The purpose of the amendment under consideration is to prohibit the enforcement of such rules . . ." S. Rep. No. 76-661, at 5 (1939). *See Sheet Metal Workers Int'l.* v. *Burlington Northern R.R.*, 736 F.2d 1250 (8th Cir. 1984) ("§ 60 was designed to prohibit the enforcement of company rules inhibiting the free flow of accident information . . . ." *Id.* at 1252.)

[8] *See Tucker; Branham; Queensberry. Cf. Nordgren* v. *Burlington Northern R.R.*, 101 F.3d 1246, 1251 (8th Cir. 1996) holding

The goal of § 60 was to level the playing field between railroads and their counsel and employees and their counsel, not to give one side an advantage by exempting it from the general rules of conduct that govern litigation. "In relation to the investigation of facts, upon which claims for injuries are based, humanity and justice demand that injured railroad men be accorded as much freedom of action as their employers enjoy." S. Rep. No. 76-661, at 5 (1939).

There is nothing in § 60 which requires a special exception to the general rules governing attorney conduct. No incompatibility exists between state ethical rules prohibiting *ex parte* contacts and the purposes of § 60. State ethics rules merely restrict certain practices by attorneys deemed, with near universality, to be unethical.[9] They do not prevent a party from obtaining evidence necessary to prepare its case, rather, they only require that in doing so generally accepted standards of conduct be followed. As a number of courts have recognized, plaintiffs' counsel may avail themselves of the established discovery process, set forth in both the federal and state rules of civil procedure, for obtaining information needed to prepare a case.[10]

This Court has held that preemption should be found only when it is the clear intent of Congress, or where

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that the term "any device whatsoever" as used in sections 55 and 60 of FELA refers only to "any other creative agreements or arrangements the railroad might come up with . . . ."

[9] The cannons of ethics are the "product of experience gained over the decades, even the centuries, and are designed to establish and assure standards of simple fairness and moral and ethical reponsibility on the part of counsel in furtherance of the ends of justice." *In Re FRM Corp.*, 430 F. Supp. 1108, 1110 (S.D. W.Va. 1977).

[10] "Absent consent of the defendant railroad's counsel, the desired information must be accessed through normal discovery methods, such as depositions or other statements taken in the presence of defendant's counsel." *Queensberry*, 157 F.R.D. at 25.

there is an irreconcilable conflict between the federal and state law.[11] Where, as here, an area traditionally governed by state law is involved, courts should be particularly reluctant to find preemption.[12] The holding of the court below, that in enacting § 60 Congress intended to nullify state ethical rules, creating a special exemption for one class of litigants, is inconsistent with this Court's teaching on preemption, and should be reviewed.

B. The Confusion Over The Scope Of Section 60 Has A Substantial Adverse Impact On Railroads' Ability To Defend FELA Lawsuits

Corporate defendants, such as railroads, have a strong interest in the evenhanded enforcement of state ethical rules on *ex parte* communications. The comments to the American Bar Association's Model Rule of Professional Conduct 4.2, upon which many state rules regarding *ex parte* communications are based, describe certain classes of corporate employees with whom *ex parte* communications are prohibited.[13] As one commentator has summarized, "those who can hurt or bind the organization *with respect to the matter at hand* are off limits except for formal discovery or except with the consent of the entity's lawyer." G. HAZARD & W. HODES, 2 THE LAW OF LAWYERING—A HANDBOOK ON THE MODEL RULES OF PRO-

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[11] *Gade* v. *National Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 96 (1992); *CSX Transp. Inc.* v. *Easterwood*, 507 U.S. 658, 663 (1993).

[12] *Easterwood supra* at 664.

[13] When a party is an organization, *ex parte* communications are prohibited with (1) persons having managerial responsibility, (2) any other person whose acts or omission in connection with the matter may be imputed to the organization for the purpose of civil or criminal liability, or (3) any person whose statement may constitute an admission on the part of the organization. AMERICAN BAR ASSOCIATION, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, Rule 4.2, at 391 (3d ed. 1996).

FESSIONAL CONDUCT, § 4.2:105 (2d ed., 1997 supplement). Depending on the facts of the case, numerous railroad employees might fall within this class and thus, within the prohibition on *ex parte* communications.[14]

The issue at stake in this case involves far more than an esoteric debate over legal ethics. Ethical constraints against *ex parte* communications are very important in FELA litigation. It is not unusual for several employees to have witnessed, or even played a role in, a workplace accident. Thus, the conduct, or even the perception of events, of a fellow employee could be integral to an FELA plaintiff's theory of liability or to a railroad's defense. The inability of a railroad to prevent *ex parte* communications with its employees can materially effect its litigation position, and make it exceedingly difficult for its counsel to prepare an effective defense.

Not only does the issue in this case have a serious impact on FELA litigation, it recurs with great frequency. FELA litigation is a daily fact of life for large railroads. With over 5,000 FELA suits being filed annually, railroad claims and law departments, and outside defense counsel, are continually involved in the investigation and discovery process, as are counsel for the plaintiffs.

Contacting rail employees without the consent of railroad counsel is commonly attempted by FELA plaintiffs'

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[14] The Federal Rules of Evidence take out of the hearsay rule altogether statements made by most organization employees, when the statements are to be introduced against the interests of the organization.

Rule 801(d)(2)(D) reads as follows:

> (d) Statements which are not hearsay. A statement is not hearsay if—
>
> (2) Admission by party-opponent. The statement is offered against a party and is * * * (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship * * *

counsel. In order to avoid prejudice to their clients, railroad attorneys must repeatedly litigate the issue of whether their opposing counsel are bound by the same ethical rules by which they must abide.[15] The issue is usually resolved only with respect to the particular case, leaving the same scenario to play itself out again.[16] Only a definitive ruling by this Court on the preemptive scope of § 60 will end this frequent resort to the courts, and clarify the rules of litigation in FELA cases.

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[15] *See e.g.*, court orders in *Johnson* v. *Illinois Central R.R.*, No. C95-0001 P(J) (W.D. Ky. Mar. 7, 1996); *Crane* v. *Paducah & Louisville Ry.*, No. C-95-0003-P(J) (W.D. Ky. May 23, 1995); *Munson* v. *Wisconsin Central Ltd.*, No. 93-C-0694 (E.D. Wis. Mar. 24, 1994); *Gross* v. *Illinois Central R.R.*, No. 3:92CV075-D-D (N.D. Miss. Nov. 19, 1992).

[16] The injunction issued against the railroad in the case below purports to authorize *ex parte* communications in all FELA cases in which Respondent's counsel represent the plaintiff. However, as Petitioners point out, other jurisdictions where these representations may occur take a contrary view of the preemptive effect of § 60. Pet. Br. at 23. If the court's injunction has *res judicata* effect, counsel here would have perquisites beyond those enjoyed by attorneys practicing in their home venue. The purported broad scope of the injunction here underscores the confusion that surrounds this issue and the need for a uniform rule.

CONCLUSION

On the basis of the foregoing, *amicus curiae* respectfully submits that the petition for a writ of *certiorari* to review the judgment of the Appellate Court of Illinois in this case be granted.

Respectfully submitted,

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No. 96-1393

In The

Supreme Court of the United States

October Term, 1996

MISSOURI PACIFIC RAILROAD COMPANY/UNION PACIFIC RAILROAD COMPANY,

Petitioners,

vs.

CHARLES A. HARPER,

Respondent.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, Fifth District

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Charles Harper, respectfully requests that this Court deny the petition for Writ of Certiorari which seeks review of the Appellate Court of Illinois, Fifth District. That opinion is reprinted in the Petition for Writ of Certiorari at Appendix A-2 through A-23.

RESTATEMENT OF THE CASE

Petitioners' statement of the case omits that they were twice cited for contempt by the Circuit Court of Madison County for violating the terms of an injunction and for deliberately altering the text of an internal work rule four months after the preliminary injunction was issued by removing words denoting a plaintiff's attorney as a party permitted to receive information via statements concerning employee injuries. Petitioners also fail to include the detailed and extensive factual record made by the Circuit Court of Madison County, finding that they had engaged in behavior which created an "atmosphere of intimidation" at the railroads as to employee witnesses of on the job injuries.

I. PROCEDURAL HISTORY

Petitioners seek a Writ of Certiorari, yet come before this Court with a history of disobeying orders of the Circuit and Appellate Courts in Illinois. The Circuit Court of Madison County specifically found that Petitioners had a history of intimidating their employees in order to ensure their silence in the presence of injured workers

and their representatives, in violation of the Federal Employers Liability Act, 45 U.S.C. § 60. Section 60 of the Act states:

> Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine. . . . Provided, That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.

Respondent Charles Harper filed suit under 45 U.S.C. § 51 *et seq.*, the Federal Employers Liability Act (hereinafter the "FELA") in November 1993, for carpal tunnel injuries caused by the negligence of Petitioners. Two months before Respondent had even filed his FELA action, Petitioners sent Harper's attorneys a letter demanding that they notify the railroads prior to communicating with any railroad employees, and to wait to interview employee witnesses until the railroads consented. Harper's attorneys responded to this letter and all others like it and then received a letter from Petitioners' counsel, in another case, stating that contacting employees regarding accidents violated ethical rules and

Petitioners would report contacts that they believed violated ethical rules. In response to the railroads' letters, and in order to engage in informal discovery, Respondent included in his complaint a request that the Circuit Court of Madison County issue a Temporary Restraining Order and an Injunction enjoining Petitioners practice of requiring their prior consent for contact with employee witnesses pursuant to 45 U.S.C. § 60.

The Circuit Court issued a TRO on November 23, 1993, and its preliminary injunction on December 9, 1993, prohibiting the railroads from "carrying out their practice, policy, and use of letters requiring knowledge and consent of employee witness interviews concerning facts incident to FELA claimants' injuries, or in any way interfering with their employees regarding such claims, . . . ". (Appendix 3). The Circuit Court of Madison County, after listening to testimony of railroad employees, found that the railroads had engaged in threatening behavior toward their employees who witnessed on-the-job injuries, which created an atmosphere of intimidation, and inhibited the free flow of information to attorneys representing injured workers. (Appendix 4). The Court also found that "persons in interest" as contemplated under § 60 of the FELA included claimants' attorneys, and therefore information regarding accidents could be given to them. Moreover, the Court found that Mr. Harper's attorneys had themselves been threatened by the railroads if they communicated *ex parte* with witnesses (Appendix 1, p. 4), and as a consequence of the railroads' actions, the Court found that Petitioners had violated § 60. (Appendix 4).

Undaunted, and completely ignoring the Court's Preliminary Injunction, Petitioners continued to send letters

to Respondent's attorneys, as well as to attorneys representing other injured workers. As a consequence, the Circuit Court entered an Order of Contempt against Petitioners on May 26, 1994, finding this behavior to be a "serious rejection of [its] authority." (Appendix 8).

In June, 1994, the Appellate Court of Illinois, Fifth District, upheld the preliminary injunction, enjoining the use of the railroads' letter to plaintiffs' attorneys. *Harper v. Missouri Pacific Railroad Company*, 636 N.E.2d 1192 (Ill.App.5th Dist. 1994) (hereinafter "Harper I") (reprinted in Petition for Writ of Certiorari, App.A-24 through A-43). The Court noted that it was unable to "conceive, nor is it seriously suggested by the defendants, that there is any purpose for sending the form letters to all FELA claimants' attorneys other than to restrict claimants' attorneys from obtaining information from railroad employees about the facts incident to the injury or death of an employee." Harper I at 1201. In fact, the railroads had never disputed that discouraging communication between their employees and attorneys for FELA claimants was their goal, nor argued that the letters did not violate § 60. *Id.* at 1202. As the Court noted, "section 60, by its very breadth, prohibits any act by the defendants to effectuate a cover-up or to make discovery of the causes of the accident more difficult." *Id.*

Two months after the Appellate Court's decision, Respondent became aware that Petitioners had revised, effective April 10, 1994, an internal work rule regulating the persons to whom their employees could speak concerning accidents. Whereas Petitioners' previous rule, Rule 807(2), authorized communication with "**a person in interest**, such as the injured employee, or an immediate

relative of the injured or deceased employee, or to an officer of the law", the revised rule, Rule 1.2.6, permitted communication only to "the injured or deceased employee, an immediate relative of the injured or deceased employee, **an authorized representative of the railroad**, or an officer of the law." In light of the Circuit Court's explicit statement in the Preliminary Injunction Order that attorneys representing FELA claimants are "persons in interest" under § 60 of the FELA, the removal of the words "person in interest" from the revised rule was "a willful and flagrant violation of [the] Court's Preliminary Injunction Order, . . . " (Reproduced in the Petition for Writ of Certiorari at Appendix A-52). The Circuit Court heard the testimony of Petitioners' employee, Robert Pugmire, a member of the committee which revised the rule, that the revision had been in the works for two years prior to the preliminary injunction order. However, the Court obviously found his testimony to be lacking credibility, and his explanations ludicrous[1]. Not only was the language of the rule changed within

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[1] The Appellate Court, with the Circuit Court, found Mr. Pugmire's testimony farcical, saying "the trial court obviously believed that the removal of the words 'persons in interest' approximately four months after the December 9, 1993, order was not a mere coincidence and chose to disregard Robert Pugmire's testimony that the change was made in order to make the rule simpler and easier to understand and that the 'rules committee' did not consider [the new rule] a change from the prior rule. . . . Here, we agree with the trial court's determination that the revision was done in willful violation of the preliminary injunction." (Reproduced at Petition for Writ of Certiorari, App.A-19).

four months of the Court's Order, but it is hard to understand how merely removing the words "person in interest" would make the rule easier to understand, as Pugmire asserted.

Thereafter, the Circuit Court found Petitioners in contempt of court for deliberately violating its orders and issued its second Contempt Order, and made the injunction permanent on June 30, 1995. (Both documents are reprinted in the Petition for Writ of Certiorari at Appendix A-44 through A-53). The injunction found that Petitioners' practice violated § 60 and was void; that Respondent's attorneys, Schlichter, Bogard & Denton, be permitted to continue interviewing, *ex parte*, employee witnesses while off duty and off railroad roperty; that any state statute which violated § 60 was void; and enjoined Petitioners from requiring their knowledge and consent with regard to interviews of employees by Schlichter, Bogard & Denton. The contempt order required Petitioners to rescind or revise the rule, to send a copy of a letter informing their employees to disregard Rule 1.2.6 regarding statements, to include with the letter to their employees a copy of the Court Order, to report to the Court concerning their compliance with the Order, and to pay certain sums of money. (App.A-52, A-53).

On August 6, 1996, the Appellate Court upheld the permanent injunction as well as the two contempt orders, stating "Defendants would obviously like this case to drag on interminably, . . . ". (App.A-12). The Appellate Court found Petitioners to be "disingenuous" by calling into question the Court's earlier opinion in Harper I. (App.A-13). Despite Petitioners' consistent claim that the trial court's specific finding that they have created an

intimidating atmosphere is unsupported by the evidence, the Appellate Court found to the contrary, stating "the witnesses who testified for defendants simply did not provide strong enough testimony to overcome the evidence produced by plaintiff that among railroad employees an atmosphere of intimidation prevailed." (App.A-13-14). The Appellate Court further said that the "plaintiff had, in fact, already established, by a preponderance of the evidence, that the general atmosphere of the railroad intimidates railroad employees from furnishing evidence in cases brought under the Act (citation omitted), and that by virtue of defendants' intimidating actions, it would be difficult for plaintiff to find employees ready to testify on plaintiff's behalf, thus establishing the need for an injunction." (App.A-14). Moreover, the testimony which Petitioners claim demonstrates that all intimidation ended at least eight years ago, and was committed by employees who are now dead or retired, is not persuasive. For instance, Wallace Deal testified that even today there is an atmosphere of fear which exists for reporting injuries, especially among laborers (App.A-15), and the Appellate Court found that, despite the witnesses assertions that their present supervisor had not threatened them to keep silent about accidents himself, the preponderance of the evidence and overall tone of the testimony persuaded it that there is a hostile environment at the railroads which intimidates employees

from voluntarily furnishing evidence to FELA claimants and their attorneys[2]. (App.A-15).

The Appellate Court minced no words when it declared "Defendants need to understand that we find these actions [violating section 60 of the FELA] reprehensible and an affront to the orderly administration of justice in cases brought under the Act. We strongly believe any court in the country would be incensed by defendants' flagrant violations of the Act." (App.A-16).

II. FACTS FOUND BY THE LOWER COURT

The Circuit Court issued its injunctions after extensive hearings and the presentation of evidence by the parties. Specifically, the trial court found that employee witnesses were reluctant to communicate with representatives of injured FELA claimants, finding:

> Defendants have created an atmosphere of intimidation of employees who have knowledge regarding on-the-job injuries, and that such atmosphere has caused some employees to

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[2] The Appellate Court based its finding of a hostile environment at the railroad on the following:

1) Defense witness Williams refused to talk to plaintiff's attorneys prior to the hearing although he did talk with the defense attorneys; 2) Defendants' witness Robert Tritch testified that he believes there is an atmosphere of intimidation at the railroad, and that he knows personally some railroad employees who have been intimidated or discouraged from talking to attorneys for an injured worker; and 3) the railroad issued a new rule on April 10, 1994 which several employees testified would lead them to believe that they should not talk to an injured worker's attorney. (App.A-15).

> refuse to talk to injured employees' representatives, and to limit their voluntary furnishing of information to employees' representatives. There exists on the part of employees of the Union Pacific/Missouri Pacific Railroad a fear of discipline or discharge if an employee voluntarily furnishes facts incident to an FELA claimant's injuries to the claimant's representatives. Representatives of the railroad, including attorneys representing the railroad, can and have intimidated employee witnesses from voluntarily providing information to claimant's representatives." (App.A-46).

The Illinois Appellate Court, Fifth District, affirmed the lower court's factual findings of an atmosphere of intimidation at the railroads. (App.A-40). The trial court further found from Respondent's testimony that Mr. Harper felt intimidated when a claims agent once came to his home to discuss an accident he witnessed, and that, as a result of filing an accident report in that incident, he was given "dirty duties". (App.A-5). The Circuit Court made a thorough factual record that an intimidating atmosphere existed such that injured workers with potential FELA claims were denied information available to Petitioners, and that witnesses possessed a "fear of discipline or discharge if an employee voluntarily furnishes facts incident to an FELA claimant's injuries to the claimant's representatives." The Court further found that Petitioners seek to prevent the free flow of information to these claimants, and that Petitioners had "threatened employees who are witnesses to on-the-job injuries", that Petitioners' letters to Respondent's counsel was a "veiled threat to Plaintiff's counsel, is ongoing and has a chilling effect on the interviewing of witnesses . . . " Finally, the

Circuit Court found that Respondent, and other employees with on-the-job injuries, would be irreparably harmed by the impairment of their right to the free flow of information regarding their FELA claims, that they would have no remedy, and that this violated the clear language and intent of § 60. (App.A-47).

REASONS FOR DENYING THE WRIT

I. The Decision of the Illinois Appellate Court Enjoining Petitioners' Practice of Requiring Notice and Consent Before an Injured Employee's Counsel Interviews an Accident Witness as Violating 45 U.S.C. § 60 was Appropriate in the Factual Context of the Instant Case.

A decision from this Court is unnecessary because the only "conflict" found between the instant and other courts concerning the effect of § 60 is largely a creation of Petitioners' imagination. None of the cases cited by Petitioners regarding § 60 have the factual record herein. There is no evidence that the cases cited by Petitioners would reach different conclusions than the instant case in the face of facts demonstrating an atmosphere of intimidation, as found by the Illinois judiciary to exist at the Missouri Pacific and Union Pacific railroads.

Most states, including Illinois, have adopted a variation of the American Bar Association's (ABA) Model Rule of Professional Conduct 4.2, which provides:

> During the course of representing a client a lawyer shall not communicate or cause to communicate on the subject of the representation

> with a party the lawyer knows to be represented by another lawyer in that matter unless the first lawyer has obtained the prior consent of the lawyer representing such other party **or as may be authorized by law.**

(emphasis added). The Official Comment to this rule clarifies those persons with whom *ex parte* communication is prohibited when one of the parties is a corporation. These persons are 1) those with managerial responsibility for the organization; 2) those whose act or omission in connection with the matter may be imputed to the organization for purposes of liability; and 3) those whose statements may constitute an admission by the organization.

The Illinois Appellate Court ruled that a railroad may not rely on the Illinois Code of Professional Conduct to side step the mandate of § 60. Similar rulings have been made by courts in New York, Georgia, New Jersey and Tennessee. *See United Transportation Union Local Unions 385 and 77 v. Metro-North Commuter Railroad Company*, 1995 WL 634906 (S.D.N.Y. 1995); *Blasena v. Consolidated Rail Corporation*, 898 F.Supp. 282 (D.N.J. 1995); *Norfolk Southern Railway Company v. Thompson*, 430 S.E.2d 371 (Ga.App. 1993); and *Lake v. Orgulf Transportation Co.*, 1993 WL 194096 (W.D.Tenn. 1993).

The cases cited by the Missouri Pacific and Union Pacific railroads do not have the factual backdrop present in the instant case and thus are inapplicable. *See* e.g. *Branham v. Norfolk & Western Railway Company*, 151 F.R.D. 67, (S.D.W.Va. 1993), *State v. O'Malley*, 888 S.W.2d 760 (Mo.App.W.D. 1994), *Tucker v. Norfolk & Western Railway Company*, 849 F.Supp. 1096 (E.D.Va. 1994), *Queensberry v.*

Norfolk & Western Railway Company, 157 F.R.D. 1993 (E.D.Va.1993) (no finding in that case that railroads' actions rose to level of coercion or intimidation), and *Garrett v. National Railroad Passenger Corp.*, 1990 WL 122911 (E.D.Pa. 1990) (no finding that railroad had engaged in a policy or practice of intimidation). As the court in *Tucker* stated "this is not to say, however, that a plaintiff would never make a showing sufficient to support a finding that the presence of a railroad's lawyer in fact would create a 'direct or indirect chill on the availability of information,' (citations omitted). *In that event, 45 U.S.C. § 60 would require a different result.*" 849 F.Supp. at 1101 (emphasis added). The Missouri Appellate Court aptly stated "for an example of railroad conduct that Congress sought to prevent, see *Harper v. Missouri Pacific R.R.*, . . . ". *O'Malley*, 888 S.W.2d at 762. The *Branham* court prefaced its decision with the observation that "at the hearing on the motion, scant attention was given the facts underlying plaintiff's claim or the circumstances involved in prior *ex parte* contacts." 151 F.R.D. at 68. Therefore, despite Petitioners' claims, the decisions rest on the varying factual records presented to the courts, not necessarily a universal conflict.

II. There is no need for this Court to "Resolve the Conflict" Among the Courts Because the "Conflict" is Based on Differing Factual Records and the Injunction Issued by the Illinois Court is Specifically Tailored to the Facts at Hand.

As previously discussed, the cases cited by Petitioners did not involve a record showing that the railroad engaged in a practice of intimidation and threats to the

free flow of information. The injunctions issued in this case were not the result merely of a ruling that § 60 preempts Illinois ethical rules which conflict with it, but included detailed findings of fact that Petitioners had created an atmosphere of intimidation, including the offending letters, in direct violation of § 60 of the FELA.

Additionally, the injunctions in the present case specifically refer to the activities in which Petitioners were engaged, and prohibit Petitioners from interfering in communications protected by § 60. The Circuit Court issued the injunctions in response to Respondent's prayer in his complaint for the Court to find that "Section 60 of the FELA (45 U.S.C.) authorized Plaintiff's representatives to communicate with railroad employees and does not require notice to or consent of, the railroad . . . ". This request is one for system-wide relief for all Petitioners' employees affected by Petitioners' illegal practice. Therefore, the injunctive orders are no broader in scope than the relief sought in the pleadings, and are binding upon Petitioners.

The relief prohibiting Petitioners' policies complies with Supreme Court decisions that the FELA is to have a uniform application throughout the country, unaffected by local views of common law rules. *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 244, 63 S.Ct. 246, 87 L.Ed. 239 (1942). This rule of uniformity for all persons falling under the FELA would require that Petitioners cease their policy, not only with respect to Respondent, but as it affects all their employees covered by the FELA.

Finally, Petitioners' incorrectly claim that the present injunction will work to enjoin other states' Rules of Professional Conduct. This is not the case. The injunction found that Petitioners violated § 60, and the factual records supports it. The injunction prohibits Petitioners from violating § 60 by sending out improper letters and intimidating employees. In fact, several of the jurisdictions which find that state ethical rules are not pre-empted explicitly stated that their decisions would be different if they had been faced with a situation similar to that herein. *See O'Malley*, 888 S.W.2d at 762, and *Tucker*, 849 F. Supp. 1101. Whether other states interpret Rule 4.2 differently is no matter in the present case where a railroad is found to violate § 60 by its own practices.

III. The Decision of the Illinois Appellate Court that 45 U.S.C. § 60 Pre-Empts State Bar Rules in the Instant Case is Correct Under the Facts of this Case, the Clear Language of Section 60 and Congress' Intent in Enacting § 60.

Given the specific factual context of the instant case, this Court need not decide whether § 60 in fact pre-empts state bar rules. However, if this Court wishes to address the issue, simply put, § 60 does. Both the language and the intent behind § 60 make it resoundingly clear that it is meant to protect railroad workers from dangers and inequities, from whatever source, which have the effect of interfering with open communication regarding accidents. Section 60 explicitly states "**Any** contract, rule, regulation, or **device whatsoever**, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing information voluntarily

to a person in interest as to facts incident to the injury or death of any employee, **shall be void**, . . . ". Using the most basic of the canons of statutory construction, the words mean what they say, and Congress is presumed to write what it means. If Congress meant only railroad rules or regulations, then Congress would have made that clear.

Moreover, the **intent** of congress, as found in S.Rep. No. 661, 76th Cong., 1st sess. 5 (1939), supports interpreting the statute as it is written:

> The railroads maintain well-organized and highly efficient claim departments. When an employee is injured, the claim agent promptly endeavors to procure statements from all witnesses to the infliction of the injury, takes photographs, measurements, and obtains all available information considered necessary to protect the railway company against a possible suit for damages.
>
> On the other hand, the claimant may be seriously handicapped in his attempt to procure information necessary to the determination of the question of liability. For example, a substantial number of the railroads subject to the Employers' Liability Act have promulgated rules which prohibit employees from giving information concerning an accident to anyone excepting certain specified company officials and claim agents.
>
> The purpose of the amendment under consideration is to prohibit the enforcement of such rules and permit those who have information concerning the facts and circumstances of a personal injury to give the statements to the injured

> employee or his dependents, or to someone authorized to represent him or them.
>
> In relation to the investigation of facts upon which claims or injuries are based, humanity and justice demand that injured railroad men be accorded as much freedom of action as their employers enjoy.
>
> The amendment fully protects the employer against abuses which might result from so-called ambulance chasing by limiting those to whom information may be given without restriction to the actual parties in interest or those who have been duly authorized to represent them.

This history demonstrates that Congress sought to level the playing field between the railroads and the injured railroad worker. Congress knew that the railroads might not play fair, and that the injured worker with an FELA claim against the railroad might not get fairness and equality if he were not permitted to talk to witnesses without the presence of the railroads' attorneys or claims personnel. As the Illinois Appellate Court noted in Harper I, "it is elementary that an attorney cannot schedule depositions or frame intelligent interrogatories without having some basic information about the facts of the case, which the attorney often cannot obtain satisfactorily from the claimant alone." 636 N.E.2d 1192. The intent of Congress makes clear that an injured railroad worker is just as harmed by *any device* which prevents him from obtaining information necessary to his claim whether the device is promulgated by the railroad or not. The effect is the same on the claimant's ability to prepare his case, and such an *effect* violates § 60.

In *United Transportation Union*, the New York District Court found that the protection of § 60 "implies the broadest kind of protection of such activity [as giving *ex parte* statements to others]." 1995 WL 634906, *4. In order to extend these protections, Congress must have intended to provide railroaders with the same freedom as their employers, which "must have included the ability to engage in informal interviewing and other expeditious means of assembling information without need for the permission or presence of opposing counsel, since the railroads themselves were free to engage in such acts." *Id.* "FELA § 60, as a matter of policy, seeks to place the fact-gathering capabilities of plaintiffs on a par with those of their employers . . . " *Id.* *6.

Another court eloquently stated that any rule which would prevent communication has the effect of constituting a "rule, regulation or device the purpose of which shall be to prevent employees from furnishing information . . . ", which directly violates § 60. *Blasena v. Consolidated Rail Corporation*, 898 F.Supp. 282. The *Blasena* court noted that railroads can interview the employee/witnesses at will, but that requiring the injured worker whom Congress sought to protect to obtain consent puts that worker in an unequal position and contravenes the intent of § 60:

> Requiring Plaintiff to either obtain Defendant consent to employee interviews, or to conduct formal depositions, clearly has the effect of discouraging co-employees from providing information relating to FELA claims. At a minimum such a requirement has a potentially inhibiting effect on the willingness of employees to step forward and share candid information with

> an injured plaintiff. Rules which have such an inhibiting effect are, plainly and simply, barred by the clear language of Section 60.
>
> Any rule which requires the railroad to consent to the interview of an employee, or which requires the presence of a railroad representative, flies squarely in the face of the **unequivocal language of § 60**, and cannot be sustained.

Id. at 286.

Finally, the state ethical rules at issue are **not** statutes, and the Code of Professional Responsibility does not have the force of law. *In re Hallett*, 58 Ill.2d 239, 319 N.E.2d 48 (Ill. 1974). They are standards of conduct and so, "as primarily a matter of courtesy, the policies behind [the rules] do not have the same weight as those behind the substantive protections of § 60. While there is no question the Code of Professional Responsibility is critical to the profession, if there is a conflict with a federal law, the federal law must take precedence." *United Transportation Union*, 1995 WL 634906, *5-6. Therefore, Petitioners' contention that a determination that a federal law pre-empts a state statute or regulation should only be made if the conflict between the two is "irreconcilable" is wholly inappropriate. The rule is an internal organizational standard of conduct for its members, not a state law. It is, however, a "device" when used by the Petitioners to inhibit the free flow of information.

IV. Petitioners Cannot Refute Evidence that Respondent's Attorneys and Employees were Intimidated by Their Policies and that the Free Flow of Information was Petitioners' Target.

The danger of intimidation which the Circuit Court found was not that the employee witnesses would feel threatened in reporting accidents which they witnessed to the employers, but that they would not share their knowledge with those representing injured employees. Petitioners' references to the record showing that employees were no longer threatened with reprisals for reporting accidents **to the railroads**, on railroad accident forms maintained within the railroad's files, has absolutely no bearing on the fact, as found by the trial court, that Petitioners were inhibiting the free flow of information between counsel and accident witnesses. Congress created § 60 in an attempt to quell the intimidation of witnesses and balance the playing field by giving FELA claimants access to the same information which the railroads were able to obtain, *ex parte*, from their employees. The instant case represents precisely the situation Congress was trying to rectify. Petitioners have not pointed to any part of the record which would discredit the trial court's finding that an atmosphere of intimidation exists which stifles the free flow of information to claimants' attorneys. Petitioners merely state that it is their current policy that employees must report accidents to them. So what.

The Circuit Court heard evidence that there is an atmosphere of fear which currently exists regarding injuries, especially among laborers and that there is a hostile environment at the railroads which intimidates

employees from voluntarily furnishing evidence to FELA claimants and their attorneys. (App.A-15). With the addition of Petitioners' revised work rule eliminating the term "person in interest" as a person to whom an employee may give information, an employee with information concerning an accident is even more unlikely to talk freely with an FELA claimant's attorney. The testimony and evidence presented at the hearings for the injunctions satisfied the Circuit Court that § 60 was violated, which findings were affirmed by the Appellate Court.

The Appellate Court continued by recognizing the difficulty in presenting evidence that railroad employees were intimidated by the railroad from providing information about an accident. In that Court's words:

> By the defendants' logic, plaintiff would be required to find the witnesses that were already inhibited from testifying in his case in order to show a likelihood of success on the merits. If plaintiff had the ability to find and talk to these witnesses, as the defendants argue he should have, then, indeed, he would not have had to resort to the court for an injunction."

(App.A-42). The trial court and Appellate Court found that Mr. Harper provided sufficient evidence to justify the injunctions. This Court need not review their findings.

V. The Illinois Circuit Court had Authority to Issue Injunctive Relief, Specifically Tailored to Affect those Parties Before it Under 45 U.S.C. § 60 Regardless of the Fact that Others may Benefit from the Injunction.

If an action is necessary in order to comply with an injunction, the fact that others who were not parties to the proceeding may benefit does not make the injunction invalid. *Bailey v. Patterson*, 323 F.2d 201, 206 (5th Cir. 1963).

The case of *Bailey v. Patterson* is similar to the present matter. In *Bailey*, African American plaintiffs sought to enjoin enforcement of state and municipal segregation laws affecting common carriers. They also sought to enjoin the maintenance of racial segregation. The District Court found that it could not provide this relief because it was class relief and no class had been certified. The Fifth Circuit reversed, finding that the named plaintiffs were entitled to the relief sought, regardless of the fact that the relief would extend to all African Americans. The Court based its decision on the nature of the relief sought – in *Bailey*, the right to use facilities which were *desegregated*, and open to all persons – and stated "the very nature of the rights appellants seek to vindicate requires that the decree run to the benefit not only of appellants but also for all persons similarly situated." *Id.* at 206. Because enjoining segregation only as it applied to the specific plaintiffs would not have provided the remedy of a desegregated environment, but only a white environment with a few non-white persons within, every single act of segregation was by necessity enjoined.

In the present matter before this Court, the relief sought by Mr. Harper similarly extends to those who were not parties. Respondent desired to conduct *ex parte* interviews of employee witnesses and Petitioners sent letters to his attorneys and enacted an internal rule, both of which had the effect of impeding the flow of information to the representatives of an injured worker covered by the FELA. In order to provide him with this relief, the court found that Petitioners were engaging in behavior which violated a federal statute, and found the behavior void. This was not a class-wide remedy, but one which, as in *Bailey*, fortuitously operates for the benefit of all affected persons.

The Circuit Court did not fashion class-wide relief as asserted by Petitioners. The injunctions named counsel and their agents as those permitted to conduct *ex parte* interviews of Petitioners' employees, and found Petitioners' practice of requiring their knowledge and consent before counsel could commence these interviews to be void pursuant to section 60. The remaining two sections found that any statute with the effect of prohibiting counsel from conducting *ex parte* interviews with Petitioners' employees regarding facts incident to FELA claimants' injuries to be pre-empted by section 60, and enjoined Petitioners from engaging in activity which had been pre-empted by federal statute.

VI. Petitioners Changed their Internal Work Rule 807 Eliminating the Words "Person in Interest" Four Months After the Circuit Court Held in its Preliminary Injunction that "Persons in Interest", Pursuant to Section 60, Included Attorneys Representing FELA Claimants and thus Petitioners Were Properly Found in Contempt of Court for Their Wilful Violation of the Preliminary Injunction.

In the Circuit Court's Preliminary Injunction it made note of the fact that attorneys for injured railroad workers are "persons in interest" pursuant to § 60. When the Court learned that four months after entering its Order, Petitioners altered their work rule **by removing the words "person in interest"**, and that this was the only change to the rule, the Court found Petitioners in contempt. Both the Circuit and Appellate Courts found Petitioners' claim that the change was made without consideration of either section 60 or the preliminary injunction wholly unbelievable and absurd. The Appellate Court found that "it is inconceivable that the revision was done for any other purpose than to attempt to prevent defendants' employees from providing information to injured parties' attorneys." (App.A-18). Such a purpose explicitly violates § 60.

No other explanation for the change is reasonable. Deleting three words which preface examples of persons to whom employees may speak cannot seriously be considered to make the rule less confusing. The effect of the change is to make the listed entities conclusive, excluding any others with whom Petitioners' employees can provide information regarding accidents.

The Court found Petitioners in contempt for willfully changing the rule in this way. It was irrelevant whether or not the witnesses were aware of the changes because the court sanctioned the behavior of the railroads. In addition, a witness testified that such a change would make him reluctant to speak with an attorney for an injured worker.

VII. The Letter Petitioners Were Ordered to Send to Their Employees Regarding their new Rule Regarding Statements is Appropriate Given Petitioners' Contempt and Sufficiently Protects Against Disclosure of Confidential and Privileged Information and Interviews During Work or on Railroad Property.

The Appellate Court addressed Petitioners' fear that the letters they have been ordered to send will result in the "purging" of their files of confidential information as employees seek to give information to injured workers and their counsel. The Court disagreed, recognizing that the letters "clearly state that rule 1.2.6 regarding *statements* should be disregarded, thus limiting the inapplicability of the rule to that section only. Additionally, we note that confidentiality in employee files is implicit, and ordering further language to be added to the letter to state such a fact is in our estimation unneccessary." (App.A-22 through A-23) (emphasis in the original).

The Appellate Court also specifically limited the injunction so that interviews should not take place on Petitioners' property or during the working hours of the employee witnesses to be interviewed. Harper I at 1204. Therefore, counsel are not permitted to seek interviews

with witnesses either on railroad grounds or during working hours. Such activity was already prohibited by the injunction and subsequent Appellate Court decision, and accordingly, Petitioners' complaint that the matter of the location and timing of interview is therefore baseless.

CONCLUSION

For the reasons stated herein, the Court should deny the Writ of Certiorari.

Respectfully Submitted,

SCHLICHTER, BOGARD & DENTON

JEROME J. SCHLICHTER
Attorney of Record
333 Salem Place, #260
Fairview Heights, IL 62208
(618) 632-3329

Counsel for Respondent
Charles A. Harper

April 1997

APPENDIX

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

CHARLES A. HARPER, Plaintiff,	)	
v.	)	CAUSE NO. 93-L-1209
MISSOURI PACIFIC RAILROAD COMPANY and UNION PACIFIC RAILROAD COMPANY, Defendants.	)	

PRELIMINARY INJUNCTION ORDER

(Filed Dec. 9, 1993)

This Court, having heard evidence and arguments of counsel, finds as follows:

1. That this Court has jurisdiction over the subject matter and the parties herein.

2. That Plaintiff has filed an action requesting that this Court declare that Plaintiff's attorneys, Schlichter, Bogard & Denton and their agents, have the right to interview employee witnesses of the Defendants ex parte who have knowledge of facts incident to an injury of a person brought pursuant to 45 U.S.C. 51 *et seq.* (FELA). Plaintiff alleges that Defendants' practice of requiring its knowledge and consent to employee witness interviews is void pursuant to 45 U.S.C. ¶60.

3. 45 U.S.C. ¶60 provides in part that "any . . . device whatsoever, the purpose, intent or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily [sic] information to a person in interest as to facts incident to the injury or death of any employee, shall be void. . . . " The purpose of 45 U.S.C. ¶60 is to equalize the access to information available to the claims departments of railroads and to individual FELA claimants and their representatives. *Stark v. Burlington Northern Railroad Company,* 538 F.Supp. 1061, 1062 (D.C. Col. 1982). Any action or device of the railroad which effectively restricts employee information as to the facts incident to any employees' injury is prohibited. *Stack v. Chicago, Minneapolis-St. Paul and Pacific Railroad Company,* 615 P.2d 457, 461 (Wash. 1980). Attorneys who represent employees asserting FELA claims or "persons in interest" pursuant to 45 U.S.C. ¶60. *Sheet Metal Workers International Association v. Burlington Northern Railway Company,* 736 F.2d 1250, 1251-52 (8th Cir. 1984).

4. This Court finds that Union Pacific Railroad/ Missouri Pacific Railroad has instituted a new policy requiring its notice and consent to interviews of its employee witnesses by Plaintiff's attorneys and other attorneys about facts incident to an [sic] FELA claim. This policy of the Union Pacific/Missouri Pacific is being applied to Charles Harper, Plaintiff herein, and to other FELA claimants who are injured while working for Union Pacific/Missouri Pacific. Attorneys representing the railroad have corresponded with counsel for Plaintiff indicating that railroads' counsel has an ethical obligation to report any ex parte interviews of employee witnesses to the Disciplinary Commission.

5. This Court finds that an actual controversy exists between this Plaintiff and his representatives, and other Plaintiffs' counsel representing injured employees in FELA matters against the Union Pacific/Missouri Pacific Railroad, and the Union Pacific/Missouri Pacific Railroad. Plaintiff has standing to bring this action because he has incurred, and continues to incur, direct harm as a result of Defendants' policy and practice, and he has a substantive interest in the protection afforded by 45 U.S.C. ¶60.

6. This Court finds, based on the evidence, that Defendants Union Pacific Railroad Company and Missouri Pacific Railroad Company have threatened employees who are witnesses to on-the-job injuries, that the effect of such threats is to coerce and intimidate employee witnesses, hindering their willingness to come forward with information about such injuries.

7. This Court further finds that the Defendants have created an atmosphere of intimidation of employees who have knowledge regarding on-the-job injuries, and that such atmosphere has caused some employees to refuse to talk to injured employees' representatives, and to limit their voluntary furnishing of information to employees' representatives. There exists on the part of employees of the Union Pacific/Missouri Pacific Railroad a fear of discipline or discharge if an employee voluntarily furnishes facts incident to an [sic] FELA claimant's injuries to the claimant's representatives. Representatives of the railroad, including attorneys representing the railroad, can and have intimidated employee witnesses from voluntarily providing information to claimant's representatives.

8. This Court finds that the purpose and effect of the policy of requiring Defendants' knowledge or consent before employees may be interviewed by injured parties' representatives is to prevent the free flow of information to injured employees and their representatives in violation of 45 U.S.C. ¶60 and that no adequate remedy at law exists to remedy this situation.

9. Defendants' attorneys, by sending letters suggesting that Plaintiff's counsel is acting unethically by conducting ex parte interview of Defendants' employees, are intimidating the representatives of FELA claimants, and this practice has the effect of preventing employee witness to on-the-job injuries from voluntarily furnishing information to claimants' attorneys, in violation of 45 U.S.C. ¶60. This Court finds that this is a veiled threat to Plaintiff's counsel, is ongoing and has a chilling effect on the interviewing of witnesses and, therefore, inhibiting the flow of voluntary information from witnesses.

10. Unless Defendants' policy and practice of requiring its knowledge and consent in order for FELA claimant's representative to interview Defendants' employees regarding facts incident to an injury, this Plaintiff, as well as other injured claimants, and Defendants' employees who have knowledge regarding on-the-job injury claims, will be irreparably harmed because their right to have the free flow of information regarding facts incident to FELA claims will be impaired, and cannot be remedied. It is not likely that once a witness has been intimidated, this can be reversed. Plaintiff has no adequate remedy at law.

11. This Court finds that it has long been the practice of FELA claimants' attorneys and their representatives to interview Defendants' employees without the knowledge and consent of the Defendants' and Defendants' new policy, practice, and letters of its attorneys, has and will continue to have, the effect of disrupting this long standing practice of ex parte interviews if this Court does not enjoin the policy and practice.

12. Based on the record before this Court, Plaintiff has shown a likelihood of success on the merits of his claim. A preliminary injunction is necessary to maintain the status quo between the parties and their representatives and continue to allow the free flow of information between FELA claimants' attorneys and Defendants' employee witnesses protected by 45 U.S.C. ¶60. Injunctive relief is available under 45 U.S.C. ¶60. *Hendley v. Central of Georgia Railroad*, 49 F.2d 1146, 1152 (5th Cir. 1980). In absence of this Court granting a preliminary injunction, Plaintiff and his representatives will suffer greater harm without the injunction than Defendants will suffer if it is issued. That is, Plaintiffs and their counsel, will be inhibited from conducting interviews of witnesses without the injunction, and with the injunction, the investigation of claims will remain in the same manner that existed before this controversy arose. Defendants will not be harmed by the requested injunctive relief.

IT IS, THEREFORE, THE ORDER OF THIS COURT THAT:

1. Defendants' practice, policy, and use of letters, instructing Plaintiff's counsel not to conduct interviews of its employees without its knowledge or consent who

have knowledge of facts incident to an [sic] FELA claimant's injury, is void pursuant to 45 U.S.C. ¶60.

2. Schlichter, Bogard & Denton and their agents may conduct ex parte interviews of Defendants' employees regarding facts incident to FELA claimants' injuries.

3. Any state statute or rule that would prohibit Plaintiff's counsel from conducting ex parte interviews with Defendants' employees regarding facts incident to FELA claimants' injuries, is preempted by federal law. 45 U.S.C. ¶60.

4. Defendants and their representatives are hereby enjoined and restrained from carrying out their practice, policy, and use of letters requiring knowledge and consent of employee witness interviews concerning facts incident to FELA claimants' injuries, or in any way interfering with ex parte communication by Plaintiff's attorneys with their employees regarding such claims, until further order of this Court.

SO ORDERED:

/s/ Daniel J. Stack

DATED: DEC 9 1993
DEC 09 1993

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

CHARLES A. HARPER, Plaintiff,	)	
-vs-	)	Case No. 93-L-1209
MISSOURI PACIFIC RAILROAD COMPANY AND UNION PACIFIC RAILROAD COMPANY, Defendants.	)	

ORDER

(Filed May 26, 1994)

On Plaintiff's Petition for a Contempt of Court Order and this Court having previously issued its Order directing Defendants Union Pacific Railroad Company and Missouri Pacific Railroad Company to show cause why they should not be held in contempt of court and the Court having heard evidence on this matter, this Court makes the following findings:

1. On December 9, 1993, this Court entered its preliminary Injunction Order finding to be a violation of 45 U.S.C. Section 60 Defendants' policy of requiring consent to attorney interviews with their employees regarding employee injuries.

2. Defendant railraods [sic] were present in court, served with, and fully aware of said Court Order.

3. After the date of this Order, Defendants have repeatedly violated the Order and have sent letters to

Schlichter, Bogard & Denton, the law firm which brought this case. Defendant railroads have also continued to send letters to other attorneys throughout the railroads' system, in violation of the Order.

4. Defendants have deliberately chosen to continue their policy enjoined in the December 9, 1993 Order, and this violation is continuing to the present; and in doing so, Defendants Union Pacific Railroad Company and Missouri Pacific Railroad Company are in contempt of this Court.

5. This Court finds the contempt by defendants to be a serious rejection of this Court's authority, and finds that it is a continuation of their intimidation of persons with knowledge regarding injury claims of defendants' employees.

6. This Court notes that Defendants have previously argued that the order is broad ranging and applies to its entire system and to all attorneys representing injured employees while arguing in the contempt hearing that the Order is limited. The Court finds that while the violation of the Court's Order by Defendants is intentional, it is not wilful at this time, based upon some typographical/ grammerical mistakes in the Preliminary Injunction Order which might have caused confusion.

IT IS THEREFORE, THE ORDER OF THIS COURT, THAT:

A. Defendants Union Pacific Railroad Company and Missouri Pacific Railroad Company by, on or before May 31, 1994, shall send a copy of this Order and a letter in the identical form to that attached hereto as Exhibit 1 to

Schlichter, Bogard & Denton, plaintiff's attorneys herein, and on or before June 5, 1994, Defendants shall send to all attorneys to whom Defendants or their attorneys have sent letters of the type described in Paragraph 1 above since December 9, 1993 a copy of this Order and a letter identical to Exhibit 1, filled out with the name of the claimant.

B. The letters set forth in the paragraph immediately above shall be sent by certified mail, return receipt requested.

C. A copy of such letters shall also be sent by June 5, 1994 to the claim agent on each claim and the outside attorney, if any, handling each claim on which a letter is sent pursuant to Paragraph 1.

D. Defendants shall not seek sanctions or penalties of any kind against attorneys who had ex parte communication or interviews with their employee witnesses regarding injuries without Defendants' knowledge or consent.

E. Defendants shall report in a letter to the Court by June 15, 1994 on their compliance with this Order, specifically listing each attorney and pertinent name of the claim on which a letter is sent.

F. A copy of this Order shall be mailed to:

Jerome J. Schlichter
Schlichter, Bogard & Denton
333 Salem Place, Suite 260
Fairview Heights, IL 62208
(Attorneys for Plaintiff)

Thomas E. Jones
Walker & Williams
4343 West Main
Belleville, IL 62223
(Attorneys for Defendants)

SO ORDERED THIS 26th day of May, 1994.

/s/ Daniel J. Stack
DANIEL J. STACK,
JUDGE OF THE CIRCUIT COURT

EXHIBIT 1

" Enclosed is a copy of a preliminary injunction order entered on December 9, 1993 by the Honorable Daniel J. Stack of the Circuit Court for Third Judicial Circuit, Madison County, Illinois enjoining the Union Pacific Railroad and the Missouri Pacific Railroad from using letters instructing Plaintiffs' counsel not to conduct interviews of its employees without its knowledge or consent concerning facts incident to FELA claimants' injuries," and a copy of the recent order entered by the same Court on May 26, 1994. The Missouri Pacific R.R. Co. and the Union Pacific R.R. Co. have been enjoined by the Court from sending you any such letter and the parties of any previous letter which refers to "not interviewing witnesses without the railroads' consent should be ignored."

(A)

Supreme Court, U.S.
FILED
APR 16 1997
CLERK

No. 96-1393

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MISSOURI PACIFIC RAILROAD COMPANY/
UNION PACIFIC RAILROAD COMPANY,
Petitioners,

VS.

CHARLES A. HARPER,
Respondent.

On Petition for Writ of Certiorari to the
Appellate Court of Illinois, Fifth District

REPLY BRIEF TO BRIEF IN OPPOSITION

LESLIE G. OFFERGELD
(Counsel of Record)

THOMAS E. JONES
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(618) 277-1000

Counsel for Petitioner

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The Decision of the Illinois Appellate Court that 45 U.S.C. §60 Pre-empts, or Authorizes a Violation of, State Ethical Rules Barring Certain *Ex Parte* Communications Between an Attorney and the Employees of an Opposing Party Conflicts with the Decisions of a Number of United States District Courts and of the Missouri Court of Appeals, and Aggravates the Existing Split of Authority in the District Courts.

Harper argues there is no conflict between the decision of the Illinois Appellate Court in this case and the decisions in other cases as to the pre-emptive effect of §60 on state rules of professional conduct. He asserts the Illinois Appellate Court's holding that §60 pre-empts RPC 4.2 was based on a factual record not present in the other cases. To the contrary, neither the trial court nor the Illinois Appellate Court found that the pre-emptive effect of §60 was peculiar to this case.

In its permanent injunction order, the trail court specifically found:

> "3. Any state statute or rule that would prohibit plaintiff's counsel from conducting *ex parte* interviews with Defendants' employees regarding facts incident to FELA claimants' injuries is preempted by federal law, 45 U.S.C. 60." (App., A-48)

Similarly, in its opinion, the Illinois Appellate Court stated that:

> "Given the purposefully broad language of section 60 and the courts' uniformly liberal construction of that language, we find that the trial court was within its sound discretion in finding that any state statute or rule, including the Rules of Professional Conduct (13 Ill.2d R. 1.1 *et seq.*), that prohibits plaintiffs' attorneys from conducting *ex parte* interviews with defendants' employees regarding facts

> incident to FELA claimants' injuries is preempted by Federal law." (App., A-39)

The above holdings were stated as rules of law, not dependent upon any factual findings.

Furthermore, there was no finding in this case that the presence of a railroad's lawyer at an employee interview or deposition would create a "direct or indirect chill on the availability of information" concerning Harper's claim. *See, Tucker v. Norfolk & Western Ry. Co.*, 849 F.Supp. 1096, 1101 (E.D.Va. 1994). Information does not have to be obtained *ex parte* to flow freely and voluntarily. *Queensberry v. Norfolk & Western Ry. Co.*, 147 F.R.D. 21, 25 (E.D.Va. 1993)

Harper further incorrectly argues that the permanent injunction in this case will not work to enjoin enforcement of other states rules of professional conduct regarding *ex parte* interviews of employees of a corporate party. On the contrary, the permanent injunction in this case includes a provision that:

> "2. Schlichter, Bogard & Denton and their agents may conduct *ex parte* interviews of Defendants' employees regarding facts incident to FELA claimants' injuries, except when on defendant's property or during the working hours of said employees.." (App., A-48)

Thus, due to the breadth of this language, Harper's attorneys, Schlichter, Bogard & Denton, could and have taken the position that in Missouri, the state of their main office, they are not bound by RPC 4.2 in FELA cases because of the injunction in this case. In the absence of the injunction, however, Missouri would hold Schlichter, Bogard & Denton to the same ethical standard in FELA cases as in any other type of case. *See, State ex rel. Atchison, Topeka, & Santa Fe R.R. v O'Malley,* 888 S.W.2d 760 (Mo.App. 1994)

A Trial Court in Illinois Does Not Have the Authority to Issue Injunctive Relief Under 45 U.S.C. §60 Giving Blanket Authorization to Respondent's Attorneys to Engage in *Ex Parte* Communications with Any and All Railroad Employees.

Harper argues an injunction is not invalid merely because nonparties to the proceeding might benefit from it, citing *Bailey v. Patterson,* 123 F.2d 210, 206 (5th Cir. 1961).[1] This case is distinguishable from *Bailey* which concerned segregation, a practice previously declared unconstitutional by this Court. Unlike segregation, the United States Supreme Court has not declared that a state's enforcement of RPC 4.2 in an FELA case violates §60 of the FELA. In the absence of a definitive ruling by this Court as to the preemptive effect of §60, the trial court in this case did not have the authority to issue a blanket injunction authorizing Schlichter, Bogard & Denton to disregard RPC 4.2 in any FELA case, regardless of the jurisdiction the case is filed in.

The Work Rule Adopted by the Major Western Railroads Governing to Whom Employees Can Give Accident Information to Without the Authorization of a Manager Does not Violate 45 U.S.C. §60.

Harper asserts there is no reasonable explanation for removing the phrase "person in interest" from Rule 1.2.6 other than to prevent employees from giving information to FELA claimants' attorneys. The sworn and uncontradicted testimony was this phrase was removed because it was vague and could include practically anyone interested in a case. (Pugmire, p. 10) Without researching the meaning of "persons in interest" as used in §60, even attorneys regularly practicing FELA law would be un-

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[1] *But see, Zepeda v. United States I.N.S.*, 753 F.2d 719, 727-730 (9th Cir. 1943)

aware of its meaning. Thus, the Railroads' explanation for removing the phrase from the rule is not "wholly unbelievable and absurd" so as to permit the trial court to completely disregard the sworn testimony of the Railroads' Director of Operating Rules. What is absurd is Harper's contention that railroad employees, laymen engaging in manual labor, know that the phrase "persons in interest" is used in §60 of the FELA, and understand the meaning of that phrase in the context of the statute.

The Letter Petitioners were Ordered to Send to Every One of Their Employees Fails to Protect Against Disclosure of Confidential and Privileged Information, and Interviews During Work or on Railroad Property.

Harper argues that the Railroads should not be concerned about employees arranging interviews on company property or during their working hours because of the court-ordered letter. He notes the injunction does not permit FELA plaintiff's counsel to conduct *ex parte* interviews on railroad property or on company time. Yet, the form letter required to be sent to the employees contains no such limitation. The letter itself states the Railroads can do nothing to prevent employees from furnishing information to attorneys for injured workers.

Harper also suggests the Railroads should not be worried about disclosure of confidential reports because the court-ordered letter only refers to statements. Specifically, the letter states, in pertinent part, "Rule 1.2.6 regarding statements should be disregarded." Rule 1.2.6 is entitled Statements and contains

three paragraphs, only the second paragraph of which is at issue in this case.[2] Thus, the letter tells the employees to disregard the entire Rule on Statements, not jut the second paragraph thereof.

CONCLUSION

For the reasons stated herein, certiorari should be granted.

Respectfully submitted,

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[2] The entire rule reads as follows:

1.2.6 Statements

Except when authorized by the proper manager:

* Information concerning accidents or personal injuries that occur to persons other than employees may be given only to an authorized representative of the railroad or an officer of the law.

* Information about the facts concerning the injury or death of an employee may be given only to the injured employee, an immediate relative of the injured or deceased employee, an authorized representative of the railroad or an officer of the law.

* Information in the files or in other privileged or confidential reports of the railroad concerning accidents or personal injuries may be given only to an authorized representative of the railroad.